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Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R. G. Borg, Warden, ***Petitioner,***

v.

Ricardo H. Robinson, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the rationale of *Stone* v. *Powell,* 428 U.S. 465 (1976), ordinarily precluding federal *habeas corpus* review of Fourth Amendment Exclusionary Rule claims raised by state prisoners, also forecloses federal *habeas corpus* inquiry into a state prisoner's evidentiary claim under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and its progeny, when the *Miranda*-based claim is unaccompanied by any assertion or proof that the challenged evidence of his statements had been obtained from him through coercion and the prisoner enjoyed a full and fair opportunity to litigate the claim in state court.

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R. G. Borg, Warden, ***Petitioner,***

v.

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Petitioner R.G. Borg, Warden of the State Prison at Folsom, California, petitions this Court for a writ of certiorari to review the published decision of a divided panel of the Ninth Circuit Court of Appeals, which granted federal *habeas corpus* relief to a convicted murderer on grounds that evidence of incriminating admissions had been obtained from him through police questioning that continued after invocation of his *Miranda* right to counsel.

OPINION BELOW

The published opinion of the Court of Appeals for the Ninth Circuit is reported as *Robinson* v. *Borg,* 918 F.2d 1387 (1990). A copy of the opinion is reproduced in the Appendix to this Petition.

JURISDICTION

The opinion below was filed on October 30, 1990, and amended on December 11, 1990. The Court of Appeals denied petitioner Borg's petition for re-hearing and suggestion for re-hearing *en banc* on May 14, 1991. Issuance of the mandate has been stayed pending the determination of this Petition for Writ of Certiorari.

Respondent Robinson originally invoked federal court jurisdiction in this *habeas corpus* case under 28 U.S.C. § 2254.

Petitioner Borg now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

Title 28, Section 2254(a), of the United States Code provides, in pertinent part:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

Eleven years ago, in 1980, law student Richard Gilman hired Las Vegas "bountyhunter" Bobby Savage and respondent Ricardo Robinson to throw lye in the face of Patricia Worrell. Savage and Robinson together drove to Los Angeles and carried out that deed, in the presence of Miss Worrell's young son, in August of that year. Miss Worrell swallowed the lye, which burned through her esophagus and a subclavian artery, and she died a painful death a few days later.

Robinson was arrested and questioned by police officers in December 1980. In a tape-recorded interview, the officers advised Robinson of his *Miranda* rights, and Robinson repeatedly expressed his willingness to waive those rights and answer questions.[1/] At first, Robinson

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1. The *Miranda* advice-and-waiver colloquy, as quoted in the dissenting opinion in the court of appeals decision in this case, took this form:

> *Detective True:* All right, before we start the interview, we wanna advise you of your rights . . .
> *Robinson:* O.K.
> *Detective True:* . . . constitutional rights, O.K.? You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak with an attorney and to have an attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge during questioning. O.K.? Do you understand each of these rights that I've explained to you?
> *Robinson:* Yeah.
> *Detective True:* Do you wish to give up the right to remain silent?

denied any involvement in the Worrell homicide. The policemen, however, told Robinson that they knew he was lying, explained to him that Gilman and Savage were abandoning him as a "fall guy," and exhorted him to tell them the truth.

Petitioner: No. I mean . . . No, *I'll speak now and answer questions without an attorney.*
Detective True: O.K. So you do wish to give up the right to remain silent?
Robinson: Yeah.
Detective True: And talk to me?
Petitioner: Right.
Detective True: O.K. Do you wish to give up that right to speak to an attorney and to have him present during questioning?
Petitioner: This questioning right . . . right here, right now? No, *I don't see why not, you know* . . . .
Officer Guarino: What do you mean? You don't, you don't want, you don't need an attorney here now, right now, while we talk?
Robinson: I mean for . . . I was, *see I ain't did nothin'. I can answer everything you want me to.*
Officer Guarino: Well, this is what we wanta understand.
Detective True: This, this is what I'm asking you. Do you give up the right to have an attorney present during our questioning right now.
Robinson: If I say yeah, I'd want an attorney then I'd have to get one here, is that right? (Unintelligible) *Yeah. I give it up, yeah, yeah.*
Detective True: O.K. . . . .

Robinson at this point said, "I have to get me a good lawyer, man. Can I make a phone call?"[2] The police officers told Robinson that he would be allowed to place the call, but asked him whether he planned to call Savage, and then reminded Robinson that they were affording him an opportunity "to tell your side of the story right now." Robinson replied that he wanted to call his mother in Pennsylvania. After momentarily balking at paying for a long-distance call, the police allowed Robinson to place a collect call. Robinson placed the call during a three-to-four minute break in the questioning. Immediately following Robinson's phone call to his mother, the questioning simply resumed. It did so without the provision of an attorney for Robinson, without any further inquiry by the police about Robinson's remark about needing a lawyer, and without any reference by Robinson to that remark either.[3]

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2. In the federal district court and in the Court of Appeals, petitioner Borg argued that the tape-recording of the interview revealed that Robinson instead had uttered these words to the interrogating policeman: "I think you'd make a good lawyer, man. Can I make a phone call?" But both the federal magistrate and the appellate court determined, after listening to the tape, that Robinson indeed had said, "I have to get me a good lawyer, man . . . ."

3. As quoted in the dissenting opinion in the Court of Appeals in this case, the exchange was as follows:

> *Robinson:* I have to get me a good lawyer, man. Can I make a phone call?
> *Ferrand: Sure. We'll let you make a phone call* . . . local? Hey, you wanta call Mr. Monday?
> *Robinson:* No.
> *Ferrand:* Do you know where . . . he is located?

Robinson, instead, began to acknowledge his participation in the attack against Miss Worrell. At first he said that he had driven Savage and another person to Los Angeles and that those two men had thrown the lye at the victim. Soon, however, Robinson admitted that he and Savage had hired themselves out to Gilman, that he and Savage had driven to Miss Worrell's home together,

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Robinson: I wish I did.
Ferrand: I know where he's located. I know where this guy is located, too.
Guarino: It's just a matter of time. It's just a matter of going out there and gettin' 'em. You have a good opportunity . . .
Robinson: . . . I guess these two guys have track records, or sumpin', huh?
Guarino: . . . to give us your (unintelligible). Hey . . . well, we're givin' you the opportunity to give us your side of the story right now, uh . . .
Robinson: I understand that.
Ferrand: You wanta call your uncle?
Robinson: I wanta call my Mom; that's my mother, man.
Guarino: Where's she, Pittsburgh?
Robinson: Yeah, Pennsylvania. (Unintelligible)
Guarino: Well, we can't . . .
Robinson: Can't do that, huh?
Ferrand: That's kind of far . . .
Guarino: Rick, we can't, we can't . . .
Robinson: I'll call collect.
Guarino: . . . Pittsburgh (unintelligible).
Robinson: I'll call collect. (Unintelligible).
Ferrand: You can call collect?
Robinson: I can call collect.
Guarino: Well, if you can, you can call.
Ferrand: Rick, tell her that you've been used . . . set up, set up by two paddies and that you don't have enough sense . . .

and that he had knocked on her door and that Savage had thrown the lye.

In April 1981, an accusatory information filed in a California trial court charged Robinson with murder, mayhem, assault with a caustic substance, and conspiracy. Before trial, Robinson sought to suppress evidence of his incriminating extrajudicial statements on *Miranda* grounds. Robinson claimed (1) that his initial expression of waiver of his *Miranda* rights was invalid because the police had fostered his misunderstanding of those rights and (2) that the police had failed to cease questioning upon his asserted invocation of his right to counsel immediately prior to his telephone call to his mother. Robinson did not testify at the hearing on this pre-trial motion. The trial judge instead considered the tape-recording and a transcript of the interrogation. The judge concluded "beyond a reasonable doubt" that Robinson's *Miranda* waiver had been knowing and voluntary, and also found that, although Robinson had "alluded" to an attorney on "a couple of occasions," he had not really asked for one.

Following the denial of the suppression motion, evidence of Robinson's incriminating admissions to the police was admitted against him in his trial. A jury found Robinson guilty of first-degree murder, conspiracy, assault, and mayhem in April 1982. The court sentenced him to state prison for a term of 25-years-to-life.

On direct appeal to the California Court of Appeal, Robinson did not argue that he had invoked his right to counsel in the mid-interrogation colloquy surrounding the placing of the telephone call. Robinson's appellate counsel, in his July 1983 brief, argued a different *Miranda* issue, focusing on the initial advice-and-waiver litany, instead. The state appellate court rejected

Robinson's different *Miranda* claim on its merits.

Nor did Robinson raise any *Miranda* claim at all in his June 1984 petition, filed in the California Supreme Court, for direct review of the state appellate court's decision upholding his conviction. Rather, Robinson refrained from re-asserting the original "invocation" claim he had raised at trial -- the claim upon which he now has obtained relief in this federal case -- until he filed a subsequent *habeas corpus* petition in the California Supreme Court in December 1987. That petition represented the first renewal of this *Miranda* "invocation" claim since his 1982 trial five years earlier. The State Supreme Court denied Robinson's petition two months later.

In March 1988, Robinson filed two separate *pro se* federal *habeas corpus* petitions. The petition that initiated the case at bar repeated the claims that Robinson's initial *Miranda* waiver was invalid and that the police later should have ceased interrogating him after his "I need to get a good lawyer, man" remark.[4/] Warden Borg responded with a written return that both addressed Robinson's allegations on their merits and also argued that the rule of *Stone* v. *Powell,* 428 U.S. 465 (1978) foreclosed federal *habeas* review of mere *Miranda*-based claims of state prisoners who had a full and fair opportunity to litigate such claims in state court.

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4. In a separate federal *habeas corpus* petition filed at the same time, Robinson alleged the inconsistent claim that his trial lawyer had acted incompetently in failing to investigate Robinson's claim that he had been too intoxicated with drugs and alcohol to understand and waive his *Miranda* rights in the first place. The magistrate, who listened to the tape-recording of the *Miranda* advice and waiver, rejected this contention. Robinson did not appeal the denial of this *habeas* petition.

There was no evidentiary hearing, and thus no testimony by Robinson, on the allegations in his federal petition. The magistrate, instead, issued a Report and Recommendation disposing of the petition on the basis of both the pleadings and his own review of the tape-recording and transcription of the challenged interrogation. First, the magistrate rejected warden Borg's *Stone* v. *Powell* argument; but he nevertheless concluded, in deferring to the state judge's factual findings, that the state court proceedings had been "full and fair." Second, the magistrate determined that Robinson's initial *Miranda* waiver had been valid. Third, the magistrate determined that Robinson's reference to getting a "good lawyer" did not amount to the kind of "unequivocal" invocation of the right to counsel that would have required a cessation in the interrogation. The magistrate declined to rule whether Robinson's remark even amounted to an "equivocal" invocation of Robinson's rights, concluding that a rule proscribing continued interrogation in the face of an equivocal invocation could not be applied retroactively anyway. In September 1988, the district court judge adopted the magistrate's Report and Recommendation.

Robinson appealed. Warden Borg, in his appellee's brief, addressed Robinson's claims on their merits, but also re-asserted the argument that the logic of *Stone* foreclosed Robinson's *Miranda* claims.

On appeal in 1990, a divided panel -- in a two-to-one majority opinion written by Judge Reinhardt and joined by Judge Norris -- reviewed the question *de novo* and held that Robinson had "unequivocally" invoked his "fifth amendment right to counsel" and that his confession after continued interrogation therefore was inadmissible under *Edwards* v. *Arizona,* 451 U.S. 477

(1981). The majority opinion did not address the argument that *Stone* precluded Robinson's claims in federal court.

In dissent, Judge Trott opined that Robinson's remark about needing a lawyer had amounted to a mere "equivocal" invocation that did not require a cessation of questioning in this case. He also noted warden Borg's *Stone* argument and, quoting at length from Justice O'Connor's concurring opinion in *Duckworth v. Eagan,* 492 U.S. 195 (1989), endorsed a "revisiting" of the Ninth Circuit decision in *Hinman v. McCarthy,* 676 F.2d 343, which had rejected extending the *Stone* rule to *Miranda* claims in 28 U.S.C. § 2254 cases.

Warden Borg petitioned for re-hearing and suggested re-hearing *en banc* on the question of the continuing validity, under *Stone,* of federal *habeas corpus* review of *Miranda* claims brought by state prisoners. The request and suggestion were denied in May 1991.

REASONS WHY THE WRIT SHOULD BE GRANTED

Certiorari Should Be Granted to Resolve an Important and Recurring Issue, Left Open by this Court in Prior Opinions, Involving Federal-State Relations in the Proper Functioning of the Criminal Justice System.

A. Importance of the Issue.

In *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court held that a Fourth Amendment Exclusionary Rule claim brought by a state prisoner was not remediable in federal *habeas corpus* proceedings if the prisoner had been provided a full and fair opportunity to litigate the claim in state court. The Court in *Stone* explained that, although enforcement of the search-and-seizure Exclusionary Rule remained justified at the trial and appellate stages of a criminal prosecution, a weighing of the competing costs and benefits dictated the conclusion that the rule should not also be enforced in collateral *habeas corpus* proceedings. The costs of the rule, as identified in *Stone,* were "well known": the diversion of the focus of the criminal trial from the issue of guilt or innocence; the suppression of reliable and probative evidence; the risk of a windfall freeing of the guilty; and the risk of "generating disrespect for the law and administration of justice." Conversely, the Court also recognized that the Exclusionary Rule's purpose of deterring police misconduct would not be furthered significantly by extending the rule to *habeas corpus* cases, given the remoteness in time of post-judgment collateral attacks and the redundant or merely incremental deterrent effect of applying the rule to an additional layer of proceedings beyond trial and direct appeals.

The Question Presented in this case, that of the continuing validity of federal *habeas* review of state prisoners' *Miranda*-based claims, remains an unresolved issue of a degree of importance at least equal to the one that motivated this Court to grant certiorari in *Powell* and compelled it to decide that case the way it did. This Court left the question open in *Wainwright* v. *Sykes,* 433 U.S. 72, 87 n. 11 (1977). And, it has indicated most recently, in *Ylst* v. *Nunnemaker,* ___ U.S. ___, ___ [59 U.S. Law Wk. 4808, 4810, n.2] n. 2 (1991), and in *Duckworth* v. *Eagan,* 492 U.S. 195, 201 n. 3 (1989), that the question remains unresolved.

Several current and former Justices of this Court have written in support of the notion that the rationale of *Stone* v. *Powell* also operates to preclude state prisoners' *Miranda* claims in federal *habeas corpus* cases. Justices O'Connor and Scalia expressed this view in a cogent concurring opinion in *Duckworth* v. *Eagan, supra,* 492 U.S. at 205-214. Former Chief Justice Burger made the same suggestion in his dissenting opinion in *Brewer* v. *Williams,* 430 U.S. 387, 420-429 (1977). Also in *Brewer,* former Justice Powell noted the importance of the issue when he wrote, "[w]hether the rationale of *Stone* should be applied to those Fifth and Sixth Amendment claims or classes of claims that more closely parallel claims under the Fourth Amendment is a question . . . which *should be resolved* only after the implications of such a ruling have been fully explored." *Brewer, supra,* 430 U.S. at 413-414 (concurring op.)(*emphasis added*).

Evidentiary objections premised upon the procedural requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) -- and upon direct interpretations of *Miranda* articulated in cases like *Edwards* v. *Arizona*, *supra,* 451 U.S. 477,

upon which the Court of Appeals relied in this case -- are by their nature "closely parallel" to the Fourth Amendment search-and-seizure claims excluded from *habeas corpus* consideration under the *Stone* rule. Most noteworthy, like Fourth Amendment objections, *Miranda* claims unaccompanied by any showing of coercion seek suppression of probative and reliable evidence of guilt. See *Solem* v. *Stumes,* 465 U.S. 638, 644. The two kinds of claims also are closely analogous in terms of their impact on the justice system and on federalism. The "costs" of entertaining state prisoners' *Miranda* claims in federal court, sometimes years after the fact, include the factors cited by this Court as justifying the rule in *Stone*: the disruptive effect on the criminal justice system's interest in finality and repose, and the destructive effect on federal-state relations that is worked by continuing federal reconsideration of *Miranda* claims already decided by the state courts.[5/] *Duckworth* v. *Eagan, supra,* 495 U.S. at 211 (concurring op., O'Connor, J.)

Granting certiorari in this case and at this time would follow logically from the recent jurisprudence of this Court on federal *habeas* review of state criminal convictions. In the last few Terms, this Court has undertaken a reform of *habeas* case law that to a significant degree has restored the writ to its proper historical position within a scheme of constitutional federalism. In doing so, this Court has treated with renewed appreciation the writ's most important role as

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5. Even a review limited to published federal appellate opinions this year indicates that federal *habeas* review of state prisoners' *Miranda* claims occurs regularly. See, e.g., *Hill* v. *Lockhart,* 927 F.2d 340, 346 (8th Cir. 1991); *Lobosco* v. *Thomas,* 928 F.2d 1054, 1059 (11th Cir. 1991); *Henderson* v. *Duggs,* 925 F.2d 1309, 1312 (11th Cir. 1991).

a safeguard against fundamental miscarriages of justice resulting in the conviction of the innocent, see, e.g., *Coleman* v. *Thompson,* ___ U.S. ___, ___ [59 U.S. Law Wk. 4789, 4796] (1991); *McClesky* v. *Zant,* _____ U.S. _____, 111 S.Ct. 1454, 1475 (1991), and has treated with serious deference both the legitimacy of the States' interest in finality in the administration of criminal law, *Coleman, supra,* [59 U.S. Law Wk. at 4796]; see *Teague* v. *Lane,* 489 U.S. 288, 309 (1989)(plurality op.), and the concientiousness with which state courts endeavor to faithfully enforce the federal rights of a criminal defendant, see *Sawyer* v. *Smith,* ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990). The Question Presented in this case implicates these values directly and represents an outstanding unresolved issue that is of a piece with this Court's recent endeavors in this area of law. It is especially ripe for certiorari review now.

As stated in Justice O'Connor's *Duckworth* concurrence, in balancing the costs and benefits of applying *Miranda's* suppression remedy to section 2254 *habeas* cases, "the scales appear . . . to tip further toward finality and repose . . . than in *Stone* itself." *Duckworth, supra,* 495 U.S. at 209 (concurring op.). This is so because, unlike search and seizure Exclusionary Rule claims that properly may be premised only upon actual violations of the constitution, *Miranda*-based claims do not necessarily represent constitutional violations. See *Oregon* v. *Elstad,* 470 U.S. 298, 306-310 (1985) (*Miranda* "sweeps more broadly than the Fifth Amendment itself" and "may be triggered in the absence of a Fifth Amendment violation"); *Duckworth, supra,* at 209 (conc. op.) *Miranda-Edwards* claims, like the one asserted by Robinson in this case, are in essence assertions of violations of the *Miranda* prophylaxis, and

not claims of unconstitutionally coerced confessions. *Solem* v. *Stumes, supra*, 465 U.S. at 644 n. 4. – The availability of a full opportunity to litigate a *Miranda*-based claim in a state court trial, and probably in later state appeals, provides sufficient assurance that *Miranda's* prophylactic rule will continue to serve its intended purpose

Respondent Robinson might argue, as he did in opposing warden Borg's suggestion for *en banc* re-hearing below, that various federal circuits have refrained from applying the *Stone* rule to *Miranda* claims. But those cases have not given full consideration to the merits of this argument, simply deferring instead to the higher authority of this Court.[6/] If anything, in their

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6. The Ninth Circuit itself, in *Hinman* v. *McCarthy,* 676 F.2d 343 (1982), merely stated its belief that the issue simply was not "open" in the circuit, having been rejected earlier in a "brief per curiam opinion" in *Patterson* v. *Warden,* 624 F.2d 69 (1980). The *Patterson* opinion, in turn, declined the state's invitation to extend *Stone* by explaining merely that *Stone* "has not been so extended." 624 F.2d at 70. Similarly, the Fifth Circuit in *Harryman* v. *Estelle,* 616 F.2d 870, 872 n. 3 (1980) (en banc) cert. denied 449 U.S. 860 (1980), declined to extend *Stone* because the issue had not been raised in the lower court and because the Supreme Court itself had not extended *Stone* in *Brewer* v. *Williams.* The Seventh Circuit per curiam opinion in *United States ex rel. Henne* v. *Fike,* 563 F.2d 809, cert. denied 434 U.S. 1072 (1978) gave only two brief reasons for refraining from extending *Stone*: the "potentially far-reaching issue" had been raised belatedly as an afterthought; and the Supreme Court had confined the *Stone* rule to Fourth Amendment claims. The Eleventh Circuit in *DeAngelo* v. *Wainwright,* 786 F.2d 1516 (1986) basically referred to the circuit's prior refusal to extend *Stone* in *Jarrell* v. *Balkcom,* 735 F.2d 1242, 1253 (1984). But *Jarrell* had declined to extend *Stone* to claims of *involuntary* confessions, and noted that *Miranda* claims in contrast bore a similarity to Fourth Amendment claims that might justify extension of the *Stone* rule to

explanations for their decisions to defer to this Court on this point, many opinions of the various Courts of Appeals tacitly have acknowledged the certworthiness of the very Question Presented in this case. For example, the First Circuit in *McCown* v. *Callahan,* 726 F.2d 1, 5 (1st Cir. 1984) cert. denied 469 U.S. 839 (1984) and the Seventh Circuit in *White* v. *Finkbeiner,* 687 F.2d 885, 889-890 (7th Cir. 1982), vacated on other grounds in *Fairman* v. *White,* 465 U.S. 1075 (1983) declined to apply the *Stone* rule to *Miranda* claims because the court had "doubt" about its power to do so and because "prudence" dictated leaving this "controversial" issue to this Court to decide. The Court of Appeals in *White,* moreover, noted that a "forceful argument can be made for extending *Stone* to *Miranda* claims. 687 F.2d at 889 n. 14.

B. This Case As an Appropriate Vehicle for Resolution of the Question Presented.

Even though the Court of Appeals in its opinion in this case relied primarily upon *Edwards* v. *Arizona, supra,* 451 U.S. 477, as the relevant precedent, it cannot be gainsaid that the case at bar stands in the *Miranda* line of cases. *Edwards,* as noted above, itself was a direct interpretation of *Miranda's* prophylactic requirement that interrogation must cease upon the accused's request for counsel. See *Smith* v. *Illinois,* 469 U.S. 91, 95 (1984); *Solem* v. *Stumes, supra,* 465 U.S. 638, 644 n. 4. The *Edwards* Court itself, in characterizing its own holding in that case, explained that it was granting relief because the state had violated Edwards' rights "as construed by

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Amendment claims that might justify extension of the *Stone* rule to them.

Miranda." 451 U.S. at 481, 482-483. Respondent Robinson in this case, in fact, asserted and litigated merely an unadorned *Miranda*-based claim, without any allegation or proof of the governmental coercion that characterizes a true Fifth Amendment self-incrimination violation. *Colorado* v. *Connelly,* 479 U.S. 157, 163-164 & n. 1. He has never deigned to testify or to submit a sworn affidavit that he subjectively felt coerced at the time of his alleged invocation of his right to counsel. In fact, he has never asserted that he meant to cut off questioning when he made the remark about needing a lawyer.

Justice O'Connor, in her concurring opinion in *Duckworth,* recited a catalogue of incongruities in the litigation of that case which illustrated why it would have served no legitimate interest to extend *Miranda*-based relief to that particular state prisoner. 492 U.S. at 207, 211. Such anomalies characterize the case at bar, too.

Perhaps most important, like the state prisoner in *Duckworth,* Robinson in this federal case has not asserted that he was factually innocent of the Worrell murder. Nor has he claimed that his challenged confession was unreliable or untrue.

There is, in addition, something capricious about Robinson's latest success in finally convincing just two federal judges that his *Miranda* invocation had been "unequivocal," where neither the dissenting appellate judge, the district court judge, the federal magistrate, the state trial judge, or Robinson's lawyer in his state appeal could discern such clarity in Robinson's alleged remark about needing a lawyer.

Finally, Robinson in this case filed inconsistent *habeas corpus* petitions, one alleging that he had invoked his fifth amendment right to counsel to cut off police

questioning, and one claiming that he had been too intoxicated even to understand that he possessed such a right in the first place. Despite this, the independent federal reviews of the paper pleadings and the four corners of the transcription of the police questioning emphasized presumptions and "prophylactic" rules, at the expense of any inquiry into whether Robinson's confession was untrue or unreliable and whether he actually was coerced into making it.

The anomalies recited in Justice O'Connor's *Duckworth* concurrence, and the additional ones present in this case, are not aberrations in federal *habeas* litigation of state prisoners' *Miranda* claims. They occur because the system of permitting such litigation fosters them. Such a system requires re-evaluation by this Honorable Court.

CONCLUSION

For these reasons, petitioner Borg requests that a writ of certiorari issue in this case.

Respectfully submitted,

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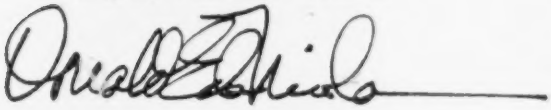

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICARDO H. ROBINSON, *Petitioner-Appellant,* v. ROBERT GLEN BORG, Warden, et al., *Respondent-Appellee.*	No. 89-55126 D.C. No. CV-88-1324-ER ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
November 1, 1989—Pasadena, California

Filed October 30, 1990
Amended December 11, 1990

Before: William A. Norris, Stephen Reinhardt and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Trott

SUMMARY

Constitutional Law/Criminal Procedure

Reversing and remanding a district court denial of a petition for habeas relief, the court of appeals held that incriminating statements made by appellant to police during custodial interrogation were improperly admitted at trial in

violation of appellant's rights under the fifth and fourteenth amendment.

Appellant Ricardo H. Robinson was convicted by a jury of first-degree (felony) murder, mayhem, assault with a caustic substance, and conspiracy to commit mayhem. Part of the evidence introduced at trial consisted of incriminating statements made by Robinson to police during custodial interrogation. Robinson sought to suppress these statements prior to trial, arguing that he had not knowingly and intelligently waived his right to counse', and that the police had not honored his subsequent request for counsel. After proper *Miranda* warnings were given by the police to Robinson, Robinson indicated he was waiving his right to counsel. Police interrogation began. At one point during the interrogation, Robinson said, "Maybe I shoulda got an attorney." After further questioning, he asked, "Man . . . can I make a phone call?" The police ignored this request. After more questioning, Robinson again asked to make a phone call, this time, however, making it clear that he wished to obtain counsel. At this point of the interrogation, Robinson made the incriminating statements. The state trial court denied Robinson's motion to suppress. The state court of appeals affirmed. The California Supreme Court denied Robinson's petition for review. The district court denied Robinson's petition for habeas relief.

[1] Once a suspect has requested the presence of an attorney, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [2] Requests for counsel are to be given broad effect even when less than all-inclusive. Doubts must be resolved in favor of protecting the constitutional claim. Moreover, a suspect's postrequest responses to further interrogation may not be used to cast restrospective doubt on the clarity of the initial request itself. [3] The court agreed that Robinson's statement that he had to get a good lawyer followed immediately

by his request to make a phone call constituted an unambiguous and unequivocal invocation of his fifth amendment right to counsel. Upon hearing Robinson's request, it was incumbent upon the police to have ceased the interrogation. Their failure to do so rendered inadmissible any statements made by Robinson in response to their continued questioning. [4] The only reasonable explanation for Robinson's decision to interrupt the questioning and ask to make the phone call was that he wanted an attorney in connection with the interrogation. The Supreme Court has not required that a suspect specify that he wants an attorney at questioning to invoke a "present" right to counsel. [5] The court did not find Robinson's request for counsel to have been ambiguous or equivocal in any other respect. That his statement was a sufficient invocation of his right to counsel was supported by a number of cases that have found similar or less direct requests to be unequivocal. [6] Because Robinson's statement was an unambiguous and unequivocal request for counsel, requiring that all interrogation cease immediately, the incriminating statements he made in response to continued questioning after that request had to be suppressed.

Dissenting, Judge Trott stated that, as he read the record, Robinson alluded to counsel on several occasions during questioning, but he never expressed either a clear change of heart concerning his earlier waiver, or a decision to stop talking with the police until he got an attorney or, for that matter, to stop talking period.

COUNSEL

Shauna Weeks (law student), William J. Genego, Charles D. Weisselberg, Post-Conviction Justice Project, University of Southern California Law Center, Los Angeles, California, for the petitioner-appellant.

Donald E. De Nicola, Supervising Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

ORDER

The dissenting opinion of Judge Trott filed October 30, 1990, slip op. at 13382-402, is amended as follows:

In the first full paragraph on page 13396, the third and fourth sentences are ordered deleted.

Insert the following in place of the third and fourth sentences as part of the first full paragraph:

> A plausible different rule, such as the rule recently announced by the Virginia Supreme Court in *Eaton v. Commonwealth*, 7 Va. L. Reports p. 13, Nos. 900038, 900039 (Va. Sept. 21, 1990) (Lexis States Library, VA File), is that once a suspect has been advised of his rights and waives them, questioning that does not run afoul of the Constitutional prohibition against self-incrimination may continue until the suspect clearly changes his mind and clearly revokes the waiver of his present right to counsel. In *Eaton*, the Virginia Supreme Court had before it a defendant who, while in custody for multiple homicides, was advised of and waived his *Miranda* rights, and then began to discuss the case with his interrogators. When the interrogation turned to the shooting of a state trooper, the suspect responded by asking, "You did say I could have an attorney if I wanted one"? The police answered his question in the affirmative and told him he did not have to tell them anything. The suspect fell silent. After a brief time, and without any attempt to clarify his thinking on the subject of an attorney, the interrogation

resumed, and the suspect made incriminating statements that were used to convict him. In discussing whether the rule of *Edwards v. Arizona* was triggered under these circumstances, the Virginia Supreme Court rendered the following analysis:

> We agree with the trial court that Eaton's utterances concerning his right to counsel were equivocal. Authorities in other jurisdictions have adopted differing standards with respect to the specificity with which a request for counsel must be expressed. Some courts require a clear and unambiguous request, some prohibit all further questioning when the subject of counsel is mentioned in any way, while others permit further questioning only for the purpose of resolving the ambiguity. The United States Supreme Court has not expressly decided the question, *Smith v. Illinois*, 469 U.S. 91, 95-96 (1984), but has expressed a preference for "bright-line rules" for the guidance of the police who must conduct custodial interrogatories [sic]. *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).
>
> The trial court, relying on *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 315, *cert. denied*, 474 U.S. 888 (1985) and *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983), concluded that the standard prevailing in Virginia is that a request for counsel must be "unambiguous and unequivocal" in order to trigger the *Edwards* rule. We distinguished the facts in *Bunch* from those in *Edwards* by pointing out that "where *Edwards* involved an

unequivocal statement by the accused that he wanted counsel. Bunch's statement ... was couched in ambiguous terms to the effect that he might want to talk to a lawyer." *Bunch*, 225 Va. at 433, 304 S.E.2d at 276 (emphasis in original). We noted a further distinction: in *Edwards*, the defendant was told that he had to talk to the police. Bunch, like Eaton, was told that he need not do so. *Id.*

The circumstances in *Poyner* were remarkably close to those of the present case. After police officers had given Poyner *Miranda* warnings, they summarized the information in their possession linking Poyner with one of the murders charged against him. At that point, Poyner asked, "Didn't you say I have the right to an attorney?" The officers said, "Yes." Citing *Bunch*, we held that the defendant's statement was not a request for counsel. "At most, it sought to clarify one of the rights of which he had already been advised." *Poyner*, 229 Va. at 410, 329 S.E.2d at 823. The trial court's view that we have required a clear request for counsel was, therefore, well-founded.

We share the U.S. Supreme Court's preference for "bright-line" rules for the guidance of those who must conduct and evaluate custodial interrogations. In further explication of the views expressed in *Bunch* and *Poyner*, we hold that the *Edwards* rule is invoked, and that custodial interrogation must cease, when the accused, having received *Miranda* warnings and having begun to respond to the questions of the

> authorities, "has clearly asserted his right to counsel." *Edwards*, 451 U.S. 485 (emphasis added). Because Eaton's words and conduct fell short of that standard, we hold that he failed to invoke his right to counsel and that the *Edwards* rule did not come into play on February 24.
>
> From the foregoing, I conclude that the rule established in *Fouche I* was a logical extension of *Edwards* and its progeny, but I do not think it was "dictated" by it.

OPINION

REINHARDT, Circuit Judge:

Appellant Ricardo H. Robinson appeals the district court's denial of his petition for writ of habeas corpus. He maintains that the state trial court improperly admitted incriminating statements he made to police during custodial interrogation, in violation of his rights under the fifth and fourteenth amendments. Robinson asserts two independent grounds for relief. First, he claims that he did not make a knowing and intelligent waiver of his right to counsel during interrogation because he did not understand that he had a right to appointed counsel. Second, he contends that, prior to making the inculpatory statements admitted at trial, he unequivocally invoked his right to counsel. We agree with Robinson that his statement "I have to get me a good lawyer, man. Can I make a phone call?" constituted an unequivocal request for counsel, requiring that the interrogation cease. Accordingly, we reverse the district court's denial of Robinson's petition for habeas corpus relief.[1]

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[1]Robinson argued, in the alternative, that his statement was an equivocal request for counsel and that, pursuant to our decision in *United States v.*

I. FACTS

Following a jury trial, Ricardo Robinson was convicted of first-degree (felony) murder, mayhem, assault with a caustic substance, and conspiracy to commit mayhem. Part of the evidence introduced against Robinson at trial consisted of incriminating statements he made to police during custodial interrogation. Robinson sought to suppress these statements prior to trial, arguing that he had not knowingly and intelligently waived his right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that the police did not honor his subsequent request for counsel. Following a hearing, at which a tape and transcript of the interrogation were introduced, the state trial court denied Robinson's motion to suppress. The statements were then admitted into evidence at his trial.

The suppression hearing reveals that the police advised Robinson of his *Miranda* rights before beginning questioning. The parties agree that the *Miranda* warnings given were correct on their face. When asked if he wished to give up his right to remain silent, Robinson stated, "No. I mean . . . No, I'll speak now and answer questions without an attorney." In response to a series of questions designed to clarify whether he wished to give up his right to an attorney at questioning, Robinson replied, "If I say yes, I'd want an attorney then I'd have to get one here, is that right? (Unintelligible) Yeah, I give it up." Police then proceeded to interrogate Robinson for approximately four and one-half hours.

Fouche, 776 F.2d 1398 (9th Cir. 1985), police were required to discontinue interrogation except for questions designed to clarify his request. Appellee countered that the holding in *Fouche* should not be applied retroactively to this case. Because we conclude that Robinson's statement constituted an unequivocal rather than an equivocal request for counsel, we need not reach that issue. Similarly, although Robinson's contention that his waiver was not knowing and intelligent is one of serious concern, our holding that Robinson unequivocally asserted his right to counsel prior to making the inculpatory statements at issue will require suppression of those statements, and it is, therefore, unnecessary for us to reach his waiver contention.

At one point during the interrogation, Robinson said, "Maybe I shoulda got an attorney." After further questioning, he asked, "Man . . . can I make a phone call?" The detective questioning Robinson ignored this request, stating, "Hey, I was going to play a . . . portion of a tape for you in a second; I want you to listen to it. O.K.?" After more questioning, Robinson again asked to make a phone call, this time, however, making it clear that he wished to obtain counsel. He stated, "I have to get me a good lawyer, man. Can I make a phone call?"[2] One of the interrogators responded by saying "sure," and then asking Robinson if he wished to call another suspect (and future co-defendant) in the case. When Robinson immediately replied "No" the interrogator resumed questioning him. Questioning continued until Robinson asked to call his mother, at which time the interrogators agreed to let him make that call. When Robinson returned from telephoning, the detectives resumed the interrogation. They then questioned him at great length concerning his knowledge of and participation in the crime under investigation. It was during this part of the interrogation that Robinson made the incriminating statements that were the subject of his pretrial motion to suppress.

Following his conviction, Robinson appealed to the California Court of Appeals. The court of appeals affirmed, ruling that the trial court's denial of the motion to suppress was amply supported by the record. The California Supreme Court denied Robinson's petition for review.

After two unsuccessful state habeas petitions, Robinson filed his federal habeas petition. The district court, adopting

[2]On appeal, the State argues that Robinson's real words were: "I think you'd make a good lawyer, man. Can I make a phone call?" The state trial court apparently, and the federal magistrate explicitly, found that Robinson stated, "I have to get me a good lawyer, man. Can I make a phone call?" After reviewing the tape of the interrogation, we have no doubt that the state court's and the magistrate's findings are correct.

the Magistrate's Report and Recommendation without modification, denied the petition. The court concluded that Robinson had knowingly and intelligently waived his right to counsel prior to the time the questioning began. The court also found that Robinson did not make an unequivocal request for counsel during the interrogation. Lastly, the court noted that, even if Robinson's statement were interpreted as an equivocal request for counsel, this court's decision in *Fouche* should not be applied retroactively to this case.[3]

II. STANDARD OF REVIEW

The state court's determination of what is said during an interrogation constitutes a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied sub nom. McKenzie v. McCormick*, 109 S. Ct. 230 (1988). Whether the suspect's words constitute a request for counsel is a legal determination which we review *de novo*. *Smith v. Endell*, 860 F.2d 1528, 1532 n.3 (9th Cir. 1988) ("[T]he state court's characterization of Smith's words is hardly a finding of fact. . . . The constitutional effect of the dialogue is a legal question subject to our independent review.").

III. DISCUSSION

[1] Under *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), if at any point during an interrogation a suspect invokes his right to counsel, all questioning must cease and may not resume in the absence of counsel unless the suspect himself initiates the further discussions. *See also Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) ("[I]f the accused invoked his right to counsel, courts may admit his responses only on find-

[3]As noted above, we will not address whether Robinson's waiver was valid or whether *Fouche* would be applied retroactively, as resolution of these issues is not necessary to the disposition of this case.

ing that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked."). Once a suspect has requested the presence of an attorney, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484. The Supreme Court has stated that *Edwards* establishes a " 'rigid' prophylactic rule." *Smith v. Illinois*, 469 U.S. at 95 (citing *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)).

[2] At issue here is whether Robinson invoked his right to counsel when he said, "I have to get me a good lawyer, man. Can I make a phone call?" Requests for counsel are to be given broad effect even when less than all-inclusive. *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). "Doubts must be resolved in favor of protecting the constitutional claim." *Michigan v. Jackson*, 475 U.S. 625, 633 (1986); *see also Smith v. Endell*, 860 F.2d 1528, 1531 n.2 (9th Cir. 1988); *Grooms v. Keeney*, 826 F.2d 883, 886 (9th Cir. 1987); *Owen v. Alabama*, 849 F.2d 536, 538-39 (11th Cir. 1988); *United States v. Gotay*, 844 F.2d 971 (2nd Cir. 1988). Moreover, a suspect's "*postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 U.S. at 100 (emphasis in original). Nevertheless, the Supreme Court has recognized that "[o]n occasion, an accused's asserted request for counsel may be ambiguous or equivocal." *Id.* at 95.

[3] Robinson argues that his statement that he had to get a good lawyer followed immediately by his request to make a phone call constituted an unambiguous and unequivocal invocation of his fifth amendment right to counsel. We agree. While the word "attorney" has no talismanic qualities, *see United States v. Jardina*, 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985), Robinson made clear his perceived need for a lawyer and his desire to obtain the assistance of counsel. No more is required. Upon hearing Robin-

son's request it was incumbent upon the police to cease the interrogation, and their failure to do so renders inadmissible any statements he made in response to their continued questioning. *Edwards*, 451 U.S. at 484-85.

The State contends that Robinson's statement was not a request for counsel because he was not attempting to invoke a *present* right to counsel. Rather, according to the State, Robinson's remark reflected his recognition that he faced a difficult criminal trial ahead. We do not believe that as a matter of either logic or semantics Robinson's statement is reasonably susceptible to such an interpretation. Nor do our cases permit such a construction.

[4] In analyzing a defendant's request for counsel, we take a defendant's words "understood as ordinary people would understand them." *Connecticut v. Barrett*, 479 U.S. at 529. Robinson's statement "I have to get me a good lawyer, man. Can I make a phone call?", made in the middle of an interrogation, can only reasonably be understood as expressing a desire to obtain counsel and to do so immediately, not at a trial several months later. Robinson's request to make a phone call immediately after stating that he had to get a good lawyer was a request to make a call at that moment, and the interrogators so understood it. The purpose of the call was obvious; Robinson wanted to obtain a lawyer — and he wanted one in connection with the interrogation he was then undergoing. If Robinson had only wanted an attorney for a trial to be held several months later, he could well have waited until after the end of the interrogation to make his call. The only reasonable explanation for Robinson's decision to interrupt the questioning and ask to make the call was that he wanted an attorney in connection with the interrogation.[4]

[4]In arguing that Robinson was not invoking a present right to counsel, the dissent and the State ask us to look at the "fuller context of the entire interrogation." The magistrate, in agreeing with the State, relied on a statement by the California Superior Court judge that, "there was an alluding to

Robinson was not required to state his request with any more temporal particularity. In rejecting a similar contention that defendants did not intend their request for counsel to encompass representation during police questioning (as opposed to formal legal proceedings), the Supreme Court in *Michigan v. Jackson*, 475 U.S. at 633 n.7, stated:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney . . . he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. . . . The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.

The Court has therefore not required that a suspect specify that he wants an attorney at questioning in order to invoke a "present" right to counsel. In *Oregon v. Bradshaw*, 462 U.S. 1039, 1041-42 (1983) (plurality opinion), for example, the

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an attorney on a couple of occasions . . . but again, *basing my feelings on the totality of the circumstances prior to and subsequent to*, there was never really an asking by Mr. Robinson for an attorney." (emphasis added). The dissent also relies heavily on Robinson's post-request responses. The dissent and the State, as well as the magistrate and the state court, err by looking at the "totality of the circumstances," particularly the events subsequent to Robinson's request, to determine whether he adequately invoked his right to counsel. The Supreme Court in *Smith v. Illinois* emphasized that an accused's postrequest responses cannot be used to cast doubt on the clarity of the initial request, 469 U.S. at 100, and "[t]he totality of the circumstances test, which is used to determine whether an accused has 'knowingly and voluntarily' waived his *Miranda* rights, has no role in the determination of whether an accused's request for counsel is clear or equivocal." *Owen v. Alabama*, 849 F.2d at 539 (citation omitted); *cf. Smith v. Illinois*, 469 U.S. at 97-98.

Court considered defendant's statement "I do want an attorney before it goes very much further" to constitute a present invocation of that right. Similarly, in *Edwards v. Arizona*, 451 U.S. at 479, the Court held that the statement "I want an attorney before making a deal" was a request for counsel that precluded any further questioning, even though no "deal" was ever made. *See United States v. Gotay*, 844 F.2d 971, 976 (2nd Cir. 1988) (noting that "the Supreme Court has been notably generous in construing the temporal aspects of requests for counsel"). Robinson's statement was sufficient to invoke his right to counsel effective immediately. There is no requirement that a suspect specify that he wants counsel at the questioning. Robinson was not required to make a temporal statement — to say that he wanted counsel right away — and his failure to do so does not render his invocation of his right less than immediate.

[5] Nor do we find Robinson's request for counsel to be ambiguous or equivocal in any other respect. As noted, Robinson made his desire to obtain an attorney clear. That his statement was a sufficient invocation of his right to counsel is supported by a number of cases that have found similar or less direct requests to be unequivocal. In *Smith v. Illinois*, 469 U.S. at 96, the Supreme Court held that a suspect had made an unequivocal request for an attorney when, upon learning that he had the right to the presence of counsel, he stated, "Uh, yeah, I'd like to do that." Recently, in *Shedelbower v. Estelle*, 885 F.2d 570, 573 (9th Cir. 1989), we treated defendant's statement "You know, I'm scared now. I think I should call an attorney." as an invocation of his right to counsel. The defendant in *Smith v. Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988), had asked police, "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?" We held that this request was conditional, but was not equivocal or ambiguous. And in *United States v. Nordling*, 804 F.2d 1466, 1471-72 (9th Cir. 1986), we found that defendant's statement that his interrogators could call his attorney to identify him

and that he wanted to speak with his lawyer when they did was a sufficient assertion of his right to counsel. *See also Owen v. Alabama*, 849 F.2d at 538-539 (defendant's response to *Miranda* warning concerning right to counsel, "I think I'll let y'all appoint me one," was arguably a clear invocation of right to counsel which should be interpreted broadly); *United States v. Gotay*, 844 F.2d at 976 (accused's statement that she could not afford a lawyer and was concerned about obtaining a lawyer was arguably a clear request for counsel, requiring that questioning cease); *White v. Finkbeiner*, 611 F.2d 186, 190 (7th Cir. 1979) (defendant's statement "I'd rather see an attorney" when asked if he wanted to talk constituted a request for counsel); *United States v. Clark*, 499 F.2d 802, 806 (4th Cir. 1974) (suspect's remark "I had better talk to a lawyer" considered a request for a lawyer). As these cases illustrate, a suspect is required neither to use any magical formulation to invoke his rights nor to express his desire to obtain counsel with lawyer-like precision. All that is required is that he make his desire to consult with an attorney clear. Robinson's statement satisfies that requirement.

Our conclusion that Robinson's invocation of his right was clear is strengthened by a comparison with cases in which a defendant's request has been held to be ambiguous or equivocal. In *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985), we first had occasion to consider what constitutes an effective assertion of the right to counsel. We held that defendant's statement that he "might want to talk to a lawyer" and wanted to make a phone call was an equivocal request for counsel, requiring that any further questioning be limited to clarifying the defendant's request. *Fouche*, 776 F.2d at 1405. On appeal after remand, we emphasized the ambivalent or uncertain nature of Fouche's request, noting:

> in some circumstances . . . the request for counsel may be equivocal or ambiguous, as when Fouche said that he *might* want to talk to a lawyer or *might* want to talk to the FBI agents.

United States v. Vouchy, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988) (emphasis in original). Our other cases have been similar. In *Grooms v. Keeney*, 826 F.2d 883, 886-87 (9th Cir. 1987), we found that the defendant's request for counsel was ambiguous or equivocal when he answered "I don't know" in response to the question whether he wished to consult with an attorney. More recently, in *Robtoy v. Kincheloe*, 871 F.2d 1478, 1482 (9th Cir. 1989), *cert. denied sub nom., Robtoy v. Callahan*, 110 S. Ct. 1483 (1990), we treated defendant's remark "maybe I should call my attorney" as an equivocal request for counsel. *Accord United States v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984) (holding that defendant's request for counsel was equivocal when he stated "maybe I should talk to an attorney before making a further statement," followed by, "why should I not get an attorney?"). Finally, in distinguishing the defendant's statement in *Smith v. Endell*, 860 F.2d at 1531, from an ambiguous or equivocal response, we noted, "[Smith's] statement was not equivocal; there was no 'might' or 'maybe' or 'perhaps.' "

[6] Robinson's statement "I have to get me a good lawyer, man. Can I make a phone call?" lacks the uncertainty and indecisiveness that is necessary to warrant classifying a statement as ambiguous or equivocal. Robinson made his perceived need for a lawyer, as well as his desire to make a phone call to obtain one, clear, and his statement evinces no doubt or indecisiveness as to whether he should seek an attorney's aid. "[T]here was no 'might' or 'maybe' or 'perhaps.' " *Id.* Robinson's statement was an unambiguous and unequivocal request for counsel, requiring that all interrogation cease immediately. The statements he made in response to continued questioning after that request must be suppressed.[5]

[5]The State does not contend that the failure to suppress Robinson's statements is harmless error. *See Chapman v. California*, 386 U.S. 18, 23 (1967).

Accordingly, we reverse the district court's denial of Robinson's habeas corpus petition and remand for proceedings not inconsistent with this opinion.[6]

REVERSED AND REMANDED.

TROTT, Circuit Judge, Dissenting:

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in

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[6]The unfortunate comments regarding *Miranda* with which our colleague introduces his dissent require a brief response. As was true in *Miranda* itself, where the defendant was ultimately retried and convicted, *see Arizona v. Miranda*, 104 Ariz. 174, 450 P.2d 364, *cert. denied*, 396 U.S. 868 (1969), our opinion does not foreclose the possibility of a new trial. It does not require that Robinson be returned to the streets or that any prison doors be unlocked. The state is free to try him again. To represent to the public that California will release him pending a new trial is disingenuous at best. Today, unremarkably, we hold only that a conviction obtained in violation of the fifth amendment cannot stand. We are required by well-established precedent and the Constitution to reach that result. Despite the dissent's attempt to denigrate *Miranda* and its progeny to the status of *mere* prophylactic rules unworthy of real implementation, the precedents we apply here are of constitutional magnitude and as binding as any other decisions of the United States Supreme Court.

Judge Trott may believe that *Miranda* was wrongly decided. It was, after all, a controversial decision in 1966. Since then, however, it has become settled law upon which defendants and law enforcement officials alike have come to rely. A citation to the *Miranda* dissent today, therefore, carries as much weight as would a citation to the dissent in *Baker v. Carr*, 369 U.S. 186 (1962) or to Justice Butler's opinion disagreeing with the rule announced in *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938). Those Supreme Court decisions were also controversial in their day, but like *Miranda*, have since been fully accepted by those in the constitutional mainstream.

> human dignity. . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Miranda v. Arizona, 384 U.S. 436, 542-43 (1966) (White, J., dissenting).

Today, these poignant and prophetic words lose their abstract quality as the prison doors that closed behind Ricardo H. Robinson in 1982 are unlocked. But my quarrel here is not with *Miranda* itself; it is with the manner in which *Miranda* and its progeny are applied by my respected colleagues to the facts and legal circumstances of this case. In that connection, this case as I see it is mostly about the prophylactic rules and remedies *designed by the judiciary* "to promote sensitivity to constitutional values through [their] deterrent effect."[1] *Duckworth v. Eagan*, _ U.S. _, 109 S. Ct., U.S. 2875, 2882 (1989). (O'Connor, J., concurring). Thus, it is appropriate in my view for the judiciary to be mindful of Justice White's concerns and to monitor carefully the costs of these rules as they are applied to the cases that come before us. Lest we lose sight of these costs, I begin with a description of Robinson's unspeakable conduct, for which a California jury found him guilty of murder with the special circumstances of torture and murder for financial gain, mayhem, assault with a caustic substance, and conspiracy to commit the above.

In 1980, Robinson's codefendant Gilman (a law school graduate) fell out with his fiancee, Patricia Worrell (a law stu-

[1]The majority points out that their opinion does not "foreclose the possibility of a new trial." Majority opinion at __. This may come as little solace to Patricia Worrell's family, to those responsible for reassembling for retrial the components of a state case now ten years old, to those who relied on the admissibility of Robinson's confession in structuring the evidence-gathering aspect of the investigation of this case, and to those who believe that a system of "justice" must strive to bring litigation to an appropriate conclusion in less than a decade.

dent). Later that year, Gilman decided on revenge. He located a "hit man," Bobby Savage, through a prostitute in Las Vegas. Savage, a pimp and a bounty hunter for a bail-bondsman, was paid $750 to "beat up" Ms. Worrell. Savage stalked Ms. Worrell in Los Angeles, but eventually returned to Las Vegas without earning his fee. Shortly thereafter, Savage telephoned Gilman and put Robinson (a drug dealer) on the line. "Robinson demanded an extra $1,000 for the job. Gilman eventually agreed to the increase in money and told Robinson he wanted them to throw lye or acid on Ms. Worrell. Gilman also told Savage and Robinson to rough Gilman up too, to make it 'look good.' " *People v. Gilman and Robinson*, 156 Cal. App. 3d 760, 763 (1984).

On August 14, 1980, Robinson and Savage knocked on Ms. Worrell's door. When she responded, Savage threw lye in her face. Gilman, who was in the house at the time, drove a crying and screaming Ms. Worrell — and her son — to the hospital.

"Ms. Worrell's upper body and face were severely disfigured by the lye. She was blinded in her left eye. Some of the lye entered her mouth, burned through her esophagus and eventually burned through a [major] artery. This eventually caused a massive hemorrhage that caused her death on August 24, 1980." *Id.* at 764.

Robinson was arrested for these crimes, and he confessed to his role in assaulting and killing Ms. Worrell.

I

My analysis of the *Miranda* issues in this case begins with the pre-interrogation advisement of rights Detective True administered to Robinson. The advisement was thorough, and its thoroughness reveals that the two detectives scrupulously respected the instructions of the Supreme Court. Detective True and his partner Officer Guarino focused directly on Robinson's right to have "an attorney present dur-

ing our questioning right now" and did not leave the subject until it was clear to them that Robinson understood and chose to answer questions voluntarily.

The exact colloquy was as follows:

> Detective True: All right, before we start the interview, we wanna advise you of your rights . . .
>
> Petitioner: O.K.
>
> Detective True: . . . constitutional rights, O.K.? You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak with an attorney and to have an attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning. O.K.? Do you understand each of these rights that I've explained to you?
>
> Petitioner: Yeah.
>
> Detective True: Do you wish to give up the right to remain silent?
>
> Petitioner: No. I mean . . . No, *I'll speak now and I'll answer questions without an attorney.*
>
> Detective True: O.K. So you do wish to give up the right to remain silent?
>
> Petitioner: Yeah.
>
> Detective True: And talk to me?
>
> Petitioner: Right.

Detective True: O.K. Do you wish to give up that right to speak to an attorney and to have him present during questioning?

Petitioner: This questioning right . . . right here, right now? No, *I don't see why not, you know* . . . (unintelligible).

Officer Guarino: What do you mean? You don't, you don't want, you don't need an attorney here now, right now, while we talk?

Petitioner: I mean for . . . I was, *see I ain't did nothin'. I can answer everything you want me to.*

Officer Guarino: Well, this is why we wanta understand.

Detective True: This. this is what I'm asking you. Do you give up the right to have an attorney present during our questioning right now.

Petitioner: If I say yea, I'd want an attorney then I'd have to get one here, is that right? (Unintelligible) *Yeah. I give it up yeah, yeah.*

Detective True: O.K. . . . .

Transcript of Interrogation of Petitioner-Appellant Ricardo H. Robinson (emphasis added).

The Supreme Court's purpose in *Miranda* was to affect police conduct during interrogations and to promote sensitivity to constitutional values. This case, along with thousands of others, provides proof it has succeeded. Moreover, the police here, by tape recording this interview, willingly exposed their behavior to close scrutiny. This is inconsistent with conduct designed to subvert Robinson's rights. Neither

does it show an intent to engage in coercive or improper behavior. The discourse is all there, on tape and in print, to listen to, to study, and to dissect.

II

Robinson's attorney claims Robinson's waiver was defective because the *Miranda* colloquy indicates that Robinson believed he was responsible for obtaining an attorney himself, whether he could afford it or not. Robinson has never so testified, and I am not persuaded that this strained attempt to read meaning into the exchange has merit. True told Robinson he could have an attorney "without charge before questioning," and Robinson's answer was clear: "I'll speak now and I'll answer questions without an attorney." Under the "totality of the circumstances surrounding the interrogation" test, *see Moran v. Burbine*, 475 U.S. 412, 421 (1986), I find a clear waiver.

III

The finding of an express waiver sheds considerable light not only on Robinson's original decision to talk, but also on (1) the meaning of Robinson's references to an attorney in the questioning that followed, references on which the majority opinion focuses in reversing the district court, and (2) what the police should have done when confronted with the references. The majority opinion finds these references to constitute an unequivocal invocation of the present right of counsel, requiring all questioning to cease at the moment the "invocation" occurred. I respectfully disagree with this analysis.

As I read the record, Robinson alluded to counsel on several occasions during questioning, but he *never* expressed either (1) a clear change of heart vis-a-vis his earlier waiver, or (2) a decision to stop talking with the police until he got an attorney or, for that matter, to stop talking period. The state-

ments "I have to get me a good lawyer man. Can I make a phone call?" *may* mean exactly that, but *in context* they require interpretation; this is the essence of ambiguity. Had these statements been made during the *initial* advisement, their meaning would no doubt have been different and — because of context and juxtaposition — might have constituted an unequivocal request for an attorney. *These* statements, however, were made in the midst of a continuing conversation *preceded by a waiver and an express willingness to talk.* I see them as calling for interpretation or clarification.

When the person being questioned has already expressly declined to secure the services of an attorney and is talking freely to the police, the logical response would be to follow-up on such statements with clarifying questions, such as, "Does that mean you don't want to talk to us anymore until you get an attorney?"[2] Ordinary people, including ordinary police officers, *see Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), would understand Robinson's words not as a clear invocation of a present right to an attorney, but as an ambiguous reference to an attorney that required clarification. What Robinson said does not necessarily mean he had changed his mind about talking to the police.

But another crucial aspect of Robinson's compound statement about an attorney and a phone call weighs heavily on what he meant, and whether it was ambiguous. Immediately following the statement, the police asked questions about who he wanted to call. His ultimate answer? "I want to call Mom; that's my mother." The exchange was as follows:

> Robinson: I have to get me a good lawyer, man. Can I make a phone call?

[2]For this case, the most appropriate example of "clarifying questions" is found in True's advisement of Robinson quoted earlier. Why a procedure that is commendable at the beginning of questioning becomes something we condemn if it is appropriate later escapes me.

Ferrand: *Sure. We'll let you make a phone call* . . . local? Hey, you wanta call Mr. Monday?

Robinson: No.

Ferrand: Do you know where . . . he is located?

Robinson: I wish I did.

Ferrand: I know where he's located. I know where this guy is located, too.

Guarino: It's just a matter of time. It's just a matter of going there and gettin' 'em. You have a good opportunity . . . .

Robinson: . . . . I guess these two guys have track records, or sumpin', huh?

Guarino: . . . . to give us your (unintelligible). Hey . . . well, we're givin' you the opportunity to give us your side of the story right now, uh. . .

Robinson: I understand that.

Guarino: . . . . You're, uh . . . I, I don't think we could be any more . . .

Ferrand: *You wanta call your uncle?*

Robinson: *I wanta call Mom; that's my mother, man.*

Guarino: Where's she, Pittsburgh?

Robinson: Yeah, Pennsylvania. (Unintelligible)

Guarino: Well, we can't . . .

Robinson: Can't do that, huh?

Ferrand: That's kinda far . . .

Guarino: Rick, we can't, we can't . . .

Robinson: I'll call collect.

Guarino: . . . Pittsburgh (unintelligible)

Robinson: I'll call collect. (Unintelligible).

Ferrand: You can call collect?

Robinson: I can call collect.

Guarino: Well, if you can, you can call.

Ferrand: Rick, tell her that you've been used . . . set up, set up by two paddies and that you don't have enough sense . . .

Transcript of Interrogation of Petitioner-Appellant Richard H. Robinson (emphasis added).

Even though the police used a name and a relationship — "Mr. Monday" and "your uncle" — in asking Robinson who he wanted to call, their questions were no different than saying, "sure you can make a phone call, who do you want to call?" The police did not drop the subject brought up by Robinson. The transcript reveals that Officer Ferrand kept it alive, and he was within constitutional bounds in so doing. Under such circumstances, the law permits the police to ask questions devised to clarify the request[3] as well as to respond

[3] *See United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985); *United States v. Nordling*, 804 F.2d 1466, 1470 (9th Cir. 1986); *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988).

naturally to the request in a manner reasonably calculated to enable the request to be effectuated. Such questions hardly amount to interrogation, much less interrogation designed to produce incriminating evidence. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). The police are not required by the Constitution when a suspect asks to make a phone call — even to an attorney — to clam up and escort the suspect to his cell without uttering another syllable. The only activity guarded against is further *interrogation*. Robinson's answer to Ferrand's inquiry — "my mother, man" — renders the complete exchange clearly ambiguous as to whether he was requesting the presence of an attorney. The judgment we are required to make on this issue cannot be an informed one unless we look at the *entire* exchange. Contrary to the majority's claim, *Smith v. Illinois*, 469 U.S. 91 (1984) does not prohibit this approach. *Smith* was concerned with an accused's "post request responses to *further interrogation*." 469 U.S. at 100 (emphasis added). Officer Ferrand's question, "[y]ou want to call your uncle?", was not "further interrogation" — it was merely a natural response to Robinson's request to make a phone call. As such, it was not a "post request response to interrogation" but an integral part of the exchange on the subject of the phone call. Thus, Ferrand's question and Robinson's answer may be looked at in deciding whether what he said was equivocal. And, in fact, the proof of the pudding was in the eating: The phone call he made — within minutes of the request and with the assistance of the police — was to his mother in Pennsylvania. After his discussion with her, he continued to talk willingly to the police, without making any references to an attorney.

The majority opinion comes to a screeching halt in its analysis with the word "lawyer," an incomplete approach that skews the inquiry, slights the law, and produces an incorrect result. *Bruni v. Lewis*, 847 F.2d 561 (9th Cir. 1988), teaches us that the word "attorney" has no talismanic qualities; the mere use of it by a suspect such as Robinson does not abruptly bring the curtain down on all further questioning. *See also*

United States v. Jardina, 747 F.2d 945, 949 (5th Cir.), *cert. denied*, 470 U.S. 1058 (1985). *Bruni* also held, *Edwards* notwithstanding, "a defendant may selectively waive his Miranda rights, deciding to respond to some questions but not to others." 847 F.2d at 564.[4] This reasoning is consistent with *Connecticut v. Barrett*, which permits police to question a suspect who says he will not make a written statement without a lawyer but will answer questions orally for the police. As the use of the word attorney did not bar further questioning in *Barrett* and *Bruni*, so it should not here either. Certainly it should not prohibit Officer Ferrand from asking Robinson if he wants to call his uncle. Thus, unlike my respected colleagues, I see Robinson's references to an attorney during the questioning as equivocal.[5]

IV

This conclusion takes me down a different analytical road than the majority has taken. The next issue I must address is the effect of an *equivocal* request for counsel and the response required of interrogating police officers.

The leading case in this circuit on the subject of mid-questioning equivocal references to an attorney is *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985) ("*Fouche I*").[6] *Fouche I* held that "where a suspect makes an *equivocal*

[4]Bruni responded to a Mirandized request that he answer questions by saying "not without my attorney." He then added, "well, ask your questions and I will answer those I see fit." *Id.*

[5]This conclusion is bolstered by the state court's factual findings. *See* 28 U.S.C. § 2254(d). The trial judge hearing the matter found the following: "[T]here was an alluding to an attorney on a couple of occasions . . . but again, basing my feelings on the totality of circumstances prior to and subsequent to, there was never really an asking by Mr. Robinson for an attorney." Report and Recommendation of United States Magistrate Charles F. Eick, filed July 19, 1988.

[6]*Fouche I* came before this court for a second time on appeal. *United States v. Fouche*, 833 F.2d 1284 (9th Cir. 1987)("*Fouche II*").

assertion of [the right to] counsel, the police must cease all questioning, except that they may attempt to clarify the suspect's desire for counsel." 776 F.2d at 1404 (emphasis added). Prior to *Fouche I*, *Edwards v. Arizona*, 451 U.S. 477 (1981), required police conducting a properly Mirandized interrogation to cease questioning when confronted by an unequivocal invocation of rights. It was not until *Fouche I*, however, that this circuit, following the Fifth Circuit in *United States v. Clerny*, 737 F.2d 1124, 1130-31 (5th Cir. 1984), advised law enforcement of the proper procedure when confronted with post-waiver equivocation. Had Robinson's interrogation occurred after 1985, *Fouche I* would have controlled, but it did not. Thus, the question is whether *Fouche I* applies retroactively to Robinson. Based on the well-reasoned recommendation of the magistrate, the district court ruled that *Fouche I* did not apply retroactively.

Teague v. Lane, 489 U.S. 288 (1989), states the test for retroactivity. In *Teague*, the Supreme Court held that "new rules" are not to be applied retroactively in collateral habeas corpus proceedings unless they decriminalize conduct or are necessary to ensure an accurate verdict — two exceptions that are not relevant to this case. How has the court defined a "new rule"? It has defined it as a holding that breaks new ground or imposes a new obligation on the states or the federal government. *Id.*; *see also, Penry v. Lynaugh*, 492 U.S. __, 109 S. Ct. 2934 (1989).

This test was refined in *Butler v. McKellar*, __ U.S. __, 110 S. Ct. 1212 (1990), where the court, holding that *Arizona v. Roberson*, 486 U.S. 675 (1988), announced a "new rule," remarked that a decision announces a new rule " 'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' " *Id.* at 1216 (emphasis in original) (citation omitted).

The court went on to point out:

> [T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached buy other courts. In *Roberson* [*Arizona v. Roberson*, 486 U.S. 675 (1988)(if an in-custody suspect invokes the right to counsel as to one investigation, police are barred from interrogating as to a separate investigation)], for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously.

110 S. Ct. at 1217 (citation omitted).

I see *Fouche I* as creating a "new rule," and I do so for four reasons. First, the Supreme Court made it clear in *Michigan v. Tucker*, 417 U.S. 433 (1974), that the *Miranda* rules are not "themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected . . . ." *Id.* at 444. *Tucker* also teaches that if the procedure or treatment complained of, measured by the historical circumstances underlying the privilege against compulsory self-incrimination, did not deprive a petitioner of a constitutional right, then we are dealing with "*only the prophylactic rules* developed to protect that right." *Id.* at 439 (emphasis added). An examination of the record in the instant case demonstrates that what we face is not compulsory self-incrimination, but an alleged violation of the rules of engagement established by *Miranda* and its progeny. This is not to relegate the rules to insignificance, but the distinction between rights themselves, on the one hand, and "suggested safeguards . . . not intended to 'create a constitu-

tional straightjacket; . . . ." on the other. *Id.* at 444 (citation omitted), is one of considerable substance.

Constitutional rights are constant; prophylactic rules by comparison are less permanent and reflect the federal judiciary's judgment of what is necessary to protect those rights. Of course, these rules are important and must be respected,[7] but they are nonetheless transient rules as compared to constitutional rights.[8] *Tucker* demonstrates this difference. When the *Tucker* court concluded it was not facing an abridgement of a constitutional principle, it applied the *Miranda* rules less stringently.

Second, I see the *Fouche I* rule as "new" in this context because, when it was articulated in 1985, it addressed an area of *Miranda* for which this circuit had issued no definitive prescription. We noted in *Fouche I* that the Supreme Court has "not addressed what constitutes a valid assertion of the right to counsel," 776 F.2d at 1404, commenting that *Edwards*

[7] *See Collazo v. Estelle*, 884 F.2d 1168, 1171 *en banc reh'g granted*, (9th Cir. 1989)(*Lexis*, Genfed library, 9th Cir file)(Trott, J., dissenting)("As long as [*Miranda*] is the law of the land, it must be respected.").

[8] This is exemplified by the comments of Justice Blackmun in his concurring opinion in *United States v. Leon*, 468 U.S. 897 (1984), albeit in a case involving the Fourth Amendment and the good-faith exception to the exclusionary rule:

> What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they will now be tested in the real world of state and federal law enforcement, and this court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.

Id. at 928.

addresses only "a right to counsel that has been 'specifically invoked.' " *Id.* Judge Tang also stated in *Fouche I*: "No Ninth Circuit cases provide guidance." *Id.* Indeed, in 1984 the Supreme Court explicitly declined to articulate a standard for determining whether equivocal statements constitute invocation of the right to counsel: "We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation." 469 U.S. at 99-100. The court noted that "courts have developed conflicting standards for determining the consequences of such ambiguities." *Id.* at 96.[9]

Third, I do not believe the rule established in *Fouche I* was "dictated" by precedent. It is not impossible to conceive of a different ruling on this issue, one that focuses on the deterrent purpose of the exclusionary rule and the recognized need for the questioning of suspects with respect to serious crimes. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). A plausible different rule, such as the rule recently announced by the Virginia Supreme Court in *Eaton v. Commonwealth*, 7 Va. L. Reports p. 13, Nos. 90038, 90039 (Va. Sept. 21, 1990) (Lexis States Library, VA File), is that once a suspect has been advised of his rights and waives them, questioning that does not run afoul of the Constitutional prohibition against self-incrimination may continue until the suspect clearly changes his mind and clearly revokes the waiver of his present right to counsel. In *Eaton*, the Virginia Supreme Court had before it a defendant who, while in custody for multiple homicides, was advised of and waived his *Miranda* rights, and then began to discuss the case with his interrogators. When the

[9]Our court also noted this lack of guidance in 1987 in *Fouche II*. Citing *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), and *Smith v. Illinois*, 469 U.S. 91, 96 (1984), Judge Nelson said, "the Supreme Court has twice explicitly declined to rule on the permissible limits of interrogation following equivocal requests." 833 F.2d at 1287, n.3.

interrogation turned to the shooting of a state trooper, the suspect responded by asking, "You did say I could have an attorney if I wanted one"? The police answered his question in the affirmative and told him he did not have to tell them anything. The suspect fell silent. After a brief time, and without any attempt to clarify his thinking on the subject of an attorney, the interrogation resumed, and the suspect made incriminating statements that were used to convict him. In discussing whether the rule of *Edwards v. Arizona* was triggered under these circumstances, the Virginia Supreme Court rendered the following analysis:

> We agree with the trial court that Eaton's utterances concerning his right to counsel were equivocal. Authorities in other jurisdictions have adopted differing standards with respect to the specificity with which a request for counsel must be expressed. Some courts require a clear and unambiguous request. some prohibit all further questioning when the subject of counsel is mentioned in any way, while others permit further questioning only for the purpose of resolving the ambiguity. The United States Supreme Court has not expressly decided the question, *Smith v. Illinois,* 469 U.S. 91, 95-96 (1984), but has expressed a preference for "bright-line rules" for the guidance of the police who must conduct custodial interrogatories [sic]. *Fare v. Michael C.,* 442 U.S. 707, 718 (1979).
>
> The trial court, relying on *Poyner v. Commonwealth,* 229 Va. 401, 329 S.E.2d 315, *cert. denied.* 474 U.S. 888 (1985) and *Bunch v. Commonwealth,* 225 Va. 423, 304 S.E.2d 271, *cert. denied,* 464 U.S. 977 (1983), concluded that the standard prevailing in Virginia is that a request for counsel must be "unambiguous and unequivocal" in order to trigger the *Edwards* rule. We distinguished the facts in *Bunch* from those in *Edwards* by pointing out that

"where *Edwards* involved an unequivocal statement by the accused that he wanted counsel, Bunch's statement . . . was couched in ambiguous terms to the effect that he might want to talk to a lawyer." *Bunch*, 225 Va. at 433, 304 S.E.2d at 276 (emphasis in original). We noted a further distinction: in *Edwards*, the defendant was told that he had to talk to the police. Bunch, like Eaton, was told that he need not do so. *Id.*

The circumstances in *Poyner* were remarkably close to those of the present case. After police officers had given Poyner *Miranda* warnings, they summarized the information in their possession linking Poyner with one of the murders charged against him. At that point, Poyner asked, "Didn't you say I have the right to an attorney?" The officers said, "Yes." Citing *Bunch*, we held that the defendant's statement was not a request for counsel. "At most, it sought to clarify one of the rights of which he had already been advised." *Poyner*, 229 Va. at 410, 329 S.E.2d at 823. The trial court's view that we have required a clear request for counsel was, therefore, well-founded.

We share the U.S. Supreme Court's preference for "bright-line" rules for the guidance of those who must conduct and evaluate custodial interrogations. In further explication of the views expressed in *Bunch* and *Poyner*, we hold that the *Edwards* rule is invoked, and that custodial interrogation must cease, when the accused, having received *Miranda* warnings and having begun to respond to the questions of the authorities, "has clearly asserted his right to counsel," *Edwards*, 451 U.S. 485 (emphasis added). Because Eaton's words and conduct fell short of that standard, we hold that he failed to invoke his right to counsel and that the *Edwards* rule did not come into play on February 24.

From the foregoing, I conclude that the rule established in *Fouche I* was a logical extension of *Edwards* and its progeny, but I do not think it was "dictated" by it.

Fourth and finally, if the judiciary takes it upon itself to guide the police with rules, as it has, it must do so fairly. When we penalize the police, and thereby society, we should do so only for not following the published rules, not for failing to anticipate what the next rule will be. To apply rules retroactively is to punish the police for failure to follow somebody who is not yet leading. This serves no deterrent purpose. It is a counterproductive practice that should be avoided as it breeds public disrespect for both the courts and the Constitution. The public understands that consequences attach when rules are broken, but the public's sense of fair play is offended by changing the rules after the game is over. This process differs materially from the process of interpreting the Constitution and applying its mandates to a given situation. In such an exercise, the rule is not being created; it already exists in the Constitution itself and is simply being impressed upon the circumstances of the case.

In sum, I conclude that *Fouche I* and its new rule cannot be applied to Robinson's interrogation, which occurred five years earlier.

Robinson's counsel argues that *Solem v. Stumes*, 465 U.S. 638 (1984), and not *Teague v. Lane* should control the issue of whether *Fouche I* should be applied retroactively. I disagree. Even if *Stumes* were controlling, however, I do not believe the *Fouche I* rule would be imposed retroactively. In *Stumes*, the Supreme Court held that the *Edwards* rule — once a suspect has "clearly invoked" his right to counsel, only the suspect may initiate subsequent conversation — did *not* apply retroactively, and it so held for four reasons. First, the *Edwards* rule does not significantly promote the court's truth-finding function, but rather is a prophylactic rule. 465 U.S. at 645. Second, although *Edwards* did not overrule a prior deci-

sion or transform standard practice, it established a new per se rule that was not a necessary consequence of *Miranda*.

> We do not think . . . police can be faulted if they did not anticipate its per se approach. . . . [I]t could be justifiably believed that a waiver of the right to counsel following its invocation could be voluntary even if the police initiated the conversation.

465 U.S. at 647-48. Third, judicial guidance was lacking; the courts were in conflict on the issue. Fourth, retroactive application might affect numerous convictions, thereby disrupting the administration of justice.

The reasons given by the Court in *Stumes* are applicable to the present case: (1) This is a prophylactic *rule* that does not promote truth-finding; (2) the police cannot be faulted for failure to anticipate *Fouche I*; (3) judicial guidance — as pointed out earlier — was lacking; and (4) retroactive application might affect numerous convictions. Thus, under either *Stumes* or *Teague*, the result would be the same. *Fouche I* cannot govern Robinson's interrogation. Accordingly, the police failure to follow up on ambiguous references to an attorney did not violate the *Miranda* rules in place at the time, and is not a basis for granting Robinson's petition for a writ of habeas corpus.[10] To alter slightly a thought from Justice Cardozo, the constable did not blunder, thus the criminal should not go free.[11]

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[10]Counsel for Robinson suggests that this issue has already been decided in favor of retroactivity, citing *Bruni v. Lewis*, 847 F.2d 561 (9th Cir.), *cert. denied*, 488 U.S. 960 (1988); *Robtoy v. Kincheloe*, 871 F.2d 1478 (9th Cir. 1989) *cert. denied*, U.S. —, 110 S. Ct. 1483 (1990); *Norman v. Ducharme*, 871 F.2d 1483 (9th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 1483 (1990). Although these cases applied *Fouche* retroactively, the issue was not discussed or presented in those cases. Thus they are not controlling as the law of the circuit on this question.

[11]This case provides an opportunity to reaffirm "the need for police questioning as a tool for effective enforcement of criminal laws." *Schneckloth v.*

V

California suggests we should refuse to hear Robinson's *Miranda* complaints on the ground that the rationale of *Stone v. Powell*, 428 U.S. 465 (1976), should foreclose collateral review of these issues. Although we rejected this argument in *Hinman v. McCarthy*, 676 F.2d 343, 349 (9th Cir.), *cert. denied*, 459 U.S. 1048 (1982), Justice O'Connor in a concurring opinion in *Duckworth v. Eagan*, _ U.S. _, 109 S. Ct. 2875 (1989) (O'Connor, J., concurring), makes a persuasive case that this issue should be revisited.

I quote Justice O'Connor:

> In *Stone v. Powell* this Court held that claims that probative evidence should have been excluded at trial because of police conduct alleged to have violated the Fourth Amendment would not be entertained in a federal habeas proceeding where a full and fair opportunity to litigate the claim had been made available in the state courts. The *Stone* Court noted that the exclusionary rule " 'is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.' " 428 U.S., at 486, quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974). The costs of such a rule are high: highly probative and often conclusive evidence of a criminal defendant's guilt is withheld from the trier of fact in the hope of "encourag[ing] those who formulate law enforcement policies, and

Bustamonte, 412 U.S. 218, 225 (1973). Society currently needs all available and civilized tools to protect itself from crime, not just those available in a laboratory. To quote *Schneckloth*: "At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal law. Without such investigations, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." 412 U.S. at 225 (citations omitted).

the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone, supra,* 428 U.S., at 492. The exclusionary rule is a structural device designed to promote sensitivity to constitutional values through its deterrent effect. As such, the rule's utility must, as this Court has long recognized, be weighed against other important values in its application. Where the rule's deterrent effect is likely to be marginal, or where its application offends other values central to our system of constitutional governance or the judicial process we have declined to extend the rule to that contest. *See, e.g., United States v. Leon,* 468 U.S. 897, 920-921 (1984) (refusing to apply exclusionary rule where police rely in good faith on a warrant issued by a neutral magistrate); *Calandra, supra,* 414 U.S., at 349 (refusing to extend the rule to grand jury proceedings because its application "would seriously impede the grand jury"); *Walder v. United States,* 347 U.S. 62, 65 (1954) (exclusionary rule does not create "a shield against contradiction of [the defendant's] untruths" and evidence seized in violation of the Fourth Amendment may be used for impeachment purposes).

In *Stone,* we found that application of the exclusionary rule to Fourth Amendment violations on federal habeas was likely to have only marginal effectiveness in deterring police misconduct, while offending important principles of federalism and finality in the criminal law which have long informed the federal courts' exercise of habeas jurisdiction. In my view, this same weighing process leads ineluctably to the conclusion that the suppression remedy should not be available on federal habeas where the state courts have accorded a petitioner a full and fair opportunity to litigate a claim that *Miranda* warnings were not given or were some-

how deficient. Indeed, the scales appear to me to tip further toward finality and repose in this context than in *Stone* itself.

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Amendment has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. See *Colorado v. Connelly*, 479 U.S. 157, 163-164, and n.1 (1986); *Malloy v. Hogan*, 378 U.S. 1, 6-8 (1964). The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.

The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself. The *Miranda* Court implicitly acknowledged as much when it indicated that procedures other than the warnings dictated by the Court's opinion might satisfy constitutional concerns, see *Miranda*, 384 U.S., at 444, and what was implicit in the *Miranda* opinion itself has been made explicit in our subsequent cases. See, *e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 306-310 (1985) (noting that the *Miranda* rule "sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation"); accord *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Tucker*, 417 U.S. 433, 442-446 (1974). Like all prophylactic rules, the *Miranda* rule "overprotects" the value at stake. In the name of efficient judicial administration of the Fifth Amendment guarantee and the need

> to create institutional respect for Fifth Amendment values, it sacrifices society's interest in uncovering evidence of crime and punishing those who violate its laws. While this balance of interests may be perfectly justified in the context of direct review of criminal convictions, in my view the balance shifts when applied to a presumptively final criminal judgment which is collaterally attacked in a federal habeas corpus proceeding.

_ U.S. at _, 109 S. Ct. at 2882-83.

In the instant case, the courts of California afforded Mr. Robinson a full and fair opportunity to litigate his *Miranda* claims. The record shows that the state trial court conducted a full evidentiary hearing on Robinson's motion to suppress. The superior court judge listened to the tape recording of the interrogation, reviewed the transcript, took live testimony, and heard argument. Robinson then appealed to the California Court of Appeal, which ruled that the trial court's denial of the motion to suppress was amply supported by the record.[12] The California Supreme Court denied Robinson's petition for a hearing, which failed to mention any *Miranda* issue. Two subsequent petitions for writs of habeas corpus, which did raise the issues now before this court, were also denied.

To apply the reasoning of Justice O'Connor's concurring opinion, numerous state and federal judges have considered Robinson's claims. No one has raised any doubt as to his guilt, the voluntariness of his incriminating statements, or their substantive value. It will accomplish nothing to disci-

[12]The unpublished opinion of the Second Appellate District of the Court of Appeal, 2d Crim. No. 42532, filed May 4, 1984, reveals that Robinson, although represented by distinguished counsel, did not raise the issue which is now central to his case. The only *Miranda* issue discussed related to the validity of his initial waiver on being advised of his rights.

pline now behavior that occurred in 1980 on the basis of a case decided in 1985. "[I]t is absurd to think that this added possibility of exclusion [of the evidence] years after the police conduct at issue will have any appreciable effect on police training or behavior." *Id.* at 2884. *Fouche I* is firmly in place. It has been controlling the activities of police for five years. It will do nothing to confirm the status quo or to promote progress to apply it to this case.

Accordingly, I would affirm the district court.

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED: July 19, 1988

RICHARD H. ROBINSON, Petitioner, v. R. G. BORG, Warden, Respondent.	NO. CV 88-1324-ER(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is submitted to the Honorable Edward Rafeedie, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

Proceedings

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" on March 11, 1988. Respondent filed a Return on April 28, 1988. Petitioner filed a Traverse on May 27, 1988.

Background

Following a jury trial, petitioner was convicted of first degree murder, mayhem, assault with a caustic substance and conspiracy to commit mayhem. (RT 4563-65, 4586.)

Part of the evidence introduced at trial consisted of incriminating statements made by petitioner during a custodial interrogation. The investigators administered *Miranda* warnings to the petitioner at the outset of that interrogation. (Return, Ex. B, 34.)

Much later in the interrogation, petitioner stated: "Maybe I shoulda got an attorney . . . ." (Return, Ex. B, 58.) Later still, petitioner said: "I have to get me a good lawyer, man. Can I make a phone call?" (Return, Ex. B, 77.) At that juncture, petitioner phoned his mother in Pennsylvania. (Return Ex. B, 77-78.)

In a pretrial suppression motion, petitioner argued that there had been no knowing and intelligent waiver of his right to have counsel present during the interrogation. He also argued that, even if there had been an initial waiver, he subsequently invoked his right to counsel.

The superior court judge listened to the tape recording of the interrogation, reviewed the transcript, took live testimony and heard argument. (RT 84-98.) The court found:

> "[I]t's unmistakably clear to this court that Mr. Robinson was advised of his rights and that he knowingly, clearly gave them up." (RT 96.)
>
> "[T]here was an alluding to an attorney on a couple of occasions . . . but again, basing my feelings on the totality of the circumstances prior to and subsequent to, there was never really an asking by Mr. Robinson for an attorney." (RT 96.)
>
> "But, this court doesn't feel that he ever asked for [an attorney] and that he knew that he had the right to one and that he wanted to talk and that's what he did. And so, the court will find that there was a proper advisement,

that there was a proper waiver, and that the burden has been met by the People and the statements will be admissible." (RT 97.)

Following conviction, petitioner raised the same issues on direct appeal to the California Court of Appeal. That court concluded that "the police officers were thorough and meticulous in determining that Robinson wanted to proceed without counsel." (Ct. of Appeal Opinion at 27.) The Petition for Review to the California Supreme Court did not mention any *Miranda* issue. However, petitioner subsequently raised his *Miranda* issues in two state habeas petitions. The California Supreme Court denied the first petition on the grounds of insufficient particularity. (Petition, Para. 7a.) The court also denied the second petition, citing a rule against repetitive petitions. (Petition, Para. 7c.)

Petitioner's Contentions

Petitioner contends that: (1) He did not validly waive his *Miranda* rights (Petition, Para. 10a); and (2) Interrogation should have ceased when petitioner made statements referring to the possibility of obtaining an attorney. (Petition, Para. 10d.)

Discussion

For the reasons discussed herein, petitioner's contentions are without merit.

I. Stone v. Powell does not foreclose collateral review of alleged Miranda violations.

Respondent argues that the rationale of *Stone* v. *Powell*, 428 U.S. 465 (1976) should foreclose collateral review of alleged *Miranda* violations. The Ninth Circuit has rejected this argument. *Hinman* v. *McCarthy*, 676 F.2d 343, 34 (9th Cir.), *cert. denied*, 459 U.S. 1048 (1982) ("We do not believe . . . the question is open in this circuit").

II. Petitioner has exhausted available state remedies.

Although the California Supreme Court never reached the merits of petitioner's contentions, it had a fair opportunity to do so. In dismissing petitioner's habeas petitions, the California Supreme Court cited *In re Swain*, 34 Cal.3d 300, 304, 209 P.2d 793 (1949), *cert. denied*, 338 U.S. 944 (1950) and *In re Miller*, 17 Cal.2d 734, 112 P.2d 10 (1941). The *Swain* decision requires dismissal of state habeas petitions that fail to disclose fully those facts upon which the petitioner bases his claim. The *Miller* decision provides that habeas petitions based upon the same grounds as prior denied habeas petitions likewise will be denied.

When the California Supreme Court dismisses a state habeas petition and cites *Swain*, the federal court must independently examine the state habeas petition to determine whether the petitioner presented his claim to the state court "with as much particularity as is practicable." *Kim* v. *Villalobos*, 799 F.2d 1317, 1320 (9th Cir. 1980). If petitioner did so, the exhaustion requirement is deemed satisfied despite the state court's failure to reach the merits. *Id.*

Petitioner's state habeas petitions presented petitioner's claims with "as much particularity as is practicable." (Return, Ex. A.) The California Supreme Court's failure to reach the merits of those claims should not prevent review in this court.

III. Petitioner waived his right to have an attorney present during the interrogation.

A federal court "must conduct an independent review of validity of a [*Miranda*] waiver." *Terrovona* v. *Kincheloe*, No. 87-3677, at 8301 (9th Cir., July 7, 1988). The voluntariness of a waiver is a mixed question of law and fact. *Id.* at 8302-8303. State court findings on subsidiary fact questions are presumed to be correct, however. *Id.* at 8302 n. 3; *see* 28 U.S.C. § 2254(d); *Ahmad* v. *Redman*, 782 F.2d 409, 412-13 (3d Cir.), *cert. denied*, 107 S.Ct. 119 (1986) (the subsidiary issue of whether defendant received and understood his *Miranda* warnings is factual).

The court has reviewed the state court's suppression proceedings, listened to the audio tape recording of the interrogation and studied the transcript of that interrogation. The court concludes that, under the "totality of circumstances" (*see e.g. United States* v. *Most*, 789 F.2d 1411, 1417 (9th Cir. 1986)), the petitioner knowingly and voluntarily waived his right to have an attorney present during questioning. The *Miranda* warnings administered to petitioner were sufficient as a matter of law. *See Patterson* v. *Illinois*, _____ U.S. _____, 88 Daily Journal D.A.R. 8134, 8137 (June 24, 1988) (the fact that a suspect may have lacked a full and sufficient appreciation of all of the consequences flowing from his waiver

of counsel does not impugn the validity of the waiver.) The petitioner clearly stated several times that he agreed to answer questions without the presence of an attorney. (Return, Ex. B, 33-34.)

The court's conclusion is supported by the state courts' findings on subsidiary fact issues:[1/] Petitioner knew he had a right to an attorney (RT 97); petitioner wanted to talk without the presence of an attorney (RT 97); and petitioner was "ruminating" rather than asking a question with regard to his right to counsel when he said: "If I say yes, I'd want an attorney then I have to get one here, is that right." (Ct. of Appeals Opinion at 27). These findings are fairly supported by the record. (RT 84-98; Return, Ex. B.)

IV. Petitioner never made an unequivocal request for the presence of an attorney

As the state court found, plaintiff alluded to counsel on several occasions, but never made an unequivocal request for the presence of an attorney. As the law in this circuit stood prior to *United States* v. *Fouche*, 776 F.2d 1398 (9th Cir. 1985) (discussed, *supra*, *infra*), petitioner's allusions to an attorney did not require the cessation of questioning.

In *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981), the Supreme Court held that once a right to counsel has been

---

1. The state court proceedings were full and fair and there is no applicable exception to the presumption provided in 28 U.S.C. § 2254(d). It is also worth noting that the state court employed a "beyond a reasonable doubt" standard for the state's burden of proving waiver, whereas federal law requires only a "preponderance" standard. (*See Colorado* v. *Connelly*, 107 S.Ct. 515, 523 (1986).

"specifically invoked," questioning must cease (the "*Edwards* rule"). *See also Brewer* v. *Williams*, 430 U.S. 387, 405 (1977) (court refers to "clearest expressions" of the desire for the presence of counsel). Petitioner's statements, "Maybe I shoulda got an attorney," and "I have to get me a good lawyer, man" did not attempt to invoke a "*present* right to counsel." *See Bruni* v. *Lewis*, 88 Daily Journal D.A.R. 9053, 9054 (9th Cir.) July 12, 1988. Petitioner's statements did not express a refusal to deal with the police except through counsel. *See Arizona* v. *Roberson*, _____ U.S. _____, 88 Daily Journal D.A.R. 7626, 7627 (June 15, 1988).

"The word 'attorney' has no talismanic qualities. A defendant does not invoke his right to counsel any time the word falls from his lips." *United States* v. *Jardina*, 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985); *See also Connecticut* v. *Barrett*, 479 U.S. 523, 525 (1987) (refusal to make a written statement without the presence of an attorney does not prohibit further oral discussions with the police).

On similar facts, federal appellate courts have failed to discern the invocation of the right to an attorney. *See Smith* v. *Dugger*, 840 F.2d 787, 793 (11th Cir. 1988) (defendant stated that he did not have an attorney "but I plan to get one"); *Wernert* v. *Arn*, 819 F.2d 613, 616 (6th Cir. 1987) (defendant stated that her husband would call an attorney); *United States* v. *Nordling*, 804 F.2d 1466, 1470-71 (9th Cir. 1986) (when asked if he wished to waive the right to remain silent, the defendant replied, "Yes, if you call my attorney in Washington . . . he can identify me").

V. The prophylactic rule of *United States* v. *Fouche* should not be applied retroactively to this case.

Petitioner's conviction became final on June 30, 1984 (Petition, Para. 46). Petitioner now seeks the benefit of a rule first adopted in this circuit in 1985: the rule that, when a suspect in a custodial interrogation makes an *equivocal* request for counsel, the investigators must cease all questioning except as necessary to clarify the suspect's equivocal request. *United States* v. *Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985) (the "*Fouche*" rule).[2/] The *Fouche* rule need not and should not be applied retroactively to convictions that were final prior to the *Fouche* decision.[3/]

The United States Supreme Court refused to apply the *Edwards* rule retroactively. *Solem* v. *Stumes*, 465 U.S. 638 (1984).

> "*Edwards* has little to do with the truthfinding function of the criminal trial . . . . It would be unreasonable to expect law enforcement authorities to have conducted themselves in accordance with its bright-line rule prior to its announcement; and retroactive application would disrupt the administration of justice. Weighing these considerations, we conclude that *Edwards* should not be applied retroactively." *Id.* at 650.

---

2. The United States Supreme Court thus far has not extended the *Edwards* rule to equivocal assertions of the right to counsel. *See Smith* v. *Illinois*, 469 U.S. 91, 99-100 (1984).

3. The court does not reach the issue of whether any of petitioner's statements qualify as an equivocal request for counsel within the meaning of the *Fouche* rule.

These same considerations apply to the *Fouche* bright-line extension of the *Edwards* rule. The *Fouche* rule "has little to do with truthfinding." "The fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate." *Solem*, *supra*, 465 U.S. at 644. Indeed, petitioner's Traverse admits his fundamental involvement in the crime, confirming the veracity of his custodial statements. (Traverse, 3-4.)

"The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Colorado* v. *Connelly*, 107 S.Ct. 515, 521 (1986). Retroactive application of the *Fouche* rule would not further the goal of deterrence. Plainly, it would be unreasonable to expect petitioner's investigators to have conducted themselves in accordance with a rule not announced by the Ninth Circuit until several years later.

Finally, retroactive application of the *Fouche* rule would "have a disruptive effect on the administration of justice." *See Solem*, *supra*, 465 U.S. at 650. Retroactive application could reverse significant numbers of remote state convictions. Retrials would be hampered by lost evidence, faulty memories, and missing witnesses. *Id.*[4/]

---

4. The above retroactivity analysis is not altered by the United States Supreme Court decision in *Griffith* v. *Kentucky* 479 U.S. 314 (1987). "In *Griffith*, the Court modified one facet of its retroactivity principles, but did so only with respect to convictions that had not become final prior to the Court's announcement of a new rule of criminal procedure. *Diaz* v. *Scully*, 821 F.2df 153, 156 (2d Cir.), *cert. denied*, 108 S.Ct. 306 (1987).

Conclusion and Recommendation

For all of the foregoing reasons, it is recommended that the Court issue an Order: (1) adopting and approving this Report and Recommendation; and (2) directing that judgment be entered denying and dismissing the petition with prejudice.

Dated: July 19, 1988.

/s/ Charles F. Eick
Charles F. Eick
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: July 20, 1988
FILED: September 9, 1988

RICHARD H. ROBINSON, Petitioner, v. R. G. BORG, Warden, Respondent.	NO. CV 88-1324-ER(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. § 636, the court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate. The court approves and adopts the Magistrate's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate's Report and Recommendation and the Judgment herein by United States mail on petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 9/9, 1988.

/s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: July 20, 1988
FILED: September 9, 1988
ENTERED: September 13, 1988

RICHARD H. ROBINSON, Petitioner,	NO. CV 88-1324-ER(E)
v.	JUDGMENT
R. G. BORG, Warden, Respondent.	

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: 9/9, 1988

/s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 14, 1991
CLERK, U.S. COURT OF APPEALS

RICARDO H. ROBINSON,	)	
	)	
Petitioner-Appellant,	)	No. 89-55126
	)	
v.	)	D.C. CV-88-1324-ER
ROBERT GLEN BORG,	)	
Warden, et al.	)	ORDER
	)	
Respondent-Appellee.	)	
	)	

Before: NORRIS, REINHARDT, and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Norris and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Trott would grant the petition and accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
SEP 6 1991
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No. 91-258

In The

Supreme Court of the United States

October Term, 1991

R. G. BORG, WARDEN,

Petitioner,

v.

RICARDO H. ROBINSON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a state prisoner should be foreclosed from presenting his claims for federal habeas corpus review when, contrary to the State's assertion, his confession was obtained through affirmative police misconduct in violation of the Fifth and Fourteenth Amendments.

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STATEMENT OF THE CASE

1. Introduction

Respondent Ricardo H. Robinson was charged and convicted in Los Angeles Superior Court of felony murder, mayhem, assault with a caustic substance and conspiracy to commit mayhem in connection with the death of Patricia Worrell in 1980. Mr. Robinson, who had no prior criminal record, was not charged as a principal, but rather as an accessory to the crime. The evidence introduced at trial showed that Worrell's boyfriend, Richard Gilman, went to Las Vegas and hired a hit man, Bobby Ray Savage (aka Rick Monday), to come to Los Angeles and throw lye on Ms. Worrell. Mr. Savage was acquainted with Mr. Robinson, and learned that Mr. Robinson planned to travel to Los Angeles to visit his family and sell diet pills. Mr. Savage and Mr. Robinson split the cost of a rent-a-car to drive to Los Angeles. Mr. Robinson drove with Savage to Worrell's residence and saw Savage commit the assault.

The principal evidence introduced against Mr. Robinson at trial consisted of statements he made to the police during custodial interrogation.[1] The police extracted these statements from Mr. Robinson after approximately four hours of cajoling, pressuring, and deception, without first obtaining a valid waiver of Mr. Robinson's Fifth Amendment rights, and after completely ignoring Mr. Robinson's request for the assistance of counsel.

---

[1] The State has never argued, nor could it argue, that any error in introducing Mr. Robinson's statements was harmless.

2. The Interrogation

a. The initial advisement

Mr. Robinson was interrogated for approximately four and one-half hours by three investigating officers. At the beginning of their interrogation, the police advised Mr. Robinson of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The advisement concluded with this colloquy:

> [DETECTIVE TRUE]: This, this is what I'm asking you. Do you give up the right to have an attorney present during our questioning right now.
>
> [ROBINSON]: *If I say yes, I'd want an attorney then I'd have to get one here, is that right*? (Unintelligible). Yeah, I give it up, yeah, yeah.[2]

TR:1-2 (emphasis added).[3]

---

[2] The government argues that Mr. Robinson "repeatedly expressed his willingness to waive [his] rights and answer questions." Petition for Writ of Certiorari at 3. However, after stating that he would answer questions without an attorney, Mr. Robinson asked a question regarding his right to have counsel appointed; this question demonstrates that Mr. Robinson did *not* in fact understand that he could have counsel appointed to be present during the interrogation. Moreover, throughout the interrogation, Mr. Robinson continued to express uncertainty regarding his right to counsel, and finally stated point blank that he needed an attorney.

[3] The interrogation transcript was filed as an exhibit in the district court. References to the transcript will be made as "TR: ___".

The police made no verbal response to Mr. Robinson's question regarding his right to an attorney.[4] Instead, they proceeded immediately with their interrogation.

b. Affirmative misrepresentations and misconduct by the police

The officers employed a variety of tactics in an attempt to induce Mr. Robinson to incriminate himself. Perhaps the most egregious tactic was the officers' affirmative misrepresentation of the law to Mr. Robinson. The officers told Mr. Robinson that if he exercised his right to remain silent and not answer their questions, the prosecution could introduce his silence into evidence and the jury could hold it against him:

> Let's say first . . . there's three guys . . . you, and two others. All right. And . . . we go to court on this thing, all right? And there's the three of you, sittin' at the damned table in court, O.K.? This man . . . states such-and-such a thing, and this guy . . . he say this . . . and that you did this, and this guy say you did that. This one says it wasn't his idea, I don't know anything. *And you sit there and the detective goes up and testify [sic] before a jury . . . "Did you talk to this guy?" "Yes." "What'd he tell you?" "Nothin'."* "What did this guy say?" "He said such-and-such." He gets up

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[4] As Mr. Robinson explained, he had received a non-verbal response to his question. One of the officers stood behind the other two and nodded his head affirmatively in response to the question. *See* Traverse to Respondent [sic] Order To Show Cause and Memorandum of Points and Authorities (filed in the district court), hereafter "Traverse," at 11.

> there, takes the stand and testifies . . . *where do you think that leaves you? What do you think these people sittin' on the jury is going to think, O.K.?* All they can do is rely on what they hear, what you say, what the other parties say.

TR:41 (emphasis added).

At the same time the officers told Mr. Robinson that his silence could be used against him at trial, they told him they were not really interested in pursuing him as a defendant. For example, the officers assured Mr. Robinson that they saw Rick Monday (aka co-defendant Bobby Ray Savage) as the truly culpable party; they told Mr. Robinson, "that's who we're interested in." TR:2 One detective told him, "you know who I'm really after . . . . No one's trying to fuck over you." TR:36 The detectives urged Mr. Robinson not to be the "fall guy"; one said "I think it's chicken shit if you're gonna take the fall for this murder." TR:18 Later, another said, "I bet you were a fall guy on this." TR:33 One said, "[y]ou're . . . protecting someone that doesn't give a shit about you. . . . I don't think you're that dumb." TR:24 They told him, "[y]ou know, now's the time to talk for yourself, Rick." TR:40

The officers repeatedly suggested to Mr. Robinson that it was in his interest to make a statement, because by doing so he could establish he was less responsible for the murder than co-defendant Savage. Detective Ferrand told Mr. Robinson, "[i]f you were just there and saw it go down . . . you tell me about it . . . " TR:24 Later, he stated: "There's a difference in throwing it and seeing someone do it . . . O.K.? You understand that? There's a big difference . . . " TR:31 He explained the situation to Mr. Robinson as follows:

> The difference is, if you have one guy that go out and looked for someone to do something to – some injury to someone – O.K., he is number one, O.K.? He thought of the idea. He went out. He contacted someone, or he contacted two people, or – let's say he contacted one guy. And this guy in turn cons someone, gets someone to go along with him for the ride, or whatever, O.K.? And this guy assaults this person and he is present, O.K.? Who are the bad guys? Who are the A number one guys that you think that the State of California would be more interested in? TR:37

Mr. Robinson answered: "The guy who thought it up, the guy who had the money, and the guy who committed the crime." Detective Ferrand responded: "All right." *Id.*

Although Detective Ferrand acknowledged that he could not tell the District Attorney how to handle the case, he nevertheless pressured Robinson to confess: "You would be admitting guilt that you saw something . . . an assault go down, you were there, O.K.? But it's not like if uh . . . you did the assault yourself, O.K.?" TR:38 Ferrand also claimed that the District Attorney would be more lenient with Mr. Robinson if he confessed:

> And if you're going to . . . assist us and telling [sic] us they're [sic] involvement in this thing- . . . that's what I go before the District Attorney with, O.K.? And that's what goes before the court, O.K.? And how the court looks upon that . . . I think it would be . . . in a sense, better than going before the court with nothing from you but other people's statements, O.K.? Now that's what you got to think about . . . " TR:44-5

c. Mr. Robinson's request for counsel

Throughout the interrogation, Mr. Robinson expressed concern about his right to counsel. At one point during the interrogation, Detective True asked Mr. Robinson if he knew what murder meant. Mr. Robinson replied: "Yes . . . yes . . . yes, I do, I do. Believe me, I do. And that's why, you know, I, hey . . . I . . . I mean, I froze, man. I didn't know if I should say to hell with it let me out, *if I should get an attorney*; I didn't know what to do, man." TR:18 (emphasis added). Later, Mr. Robinson stated: "you tried . . . you tried to (unintelligible) here, man. *Maybe I shoulda got an attorney, man, 'cause . . .* " The police ignored this statement. TR:26 After further questioning, the following dialogue occurred:

> [ROBINSON]: Man . . . can I make a phone call?
>
> [DETECTIVE TRUE]: Hey, I was going to play a . . . portion of a tape for you in a second; I want you to listen to it, O.K.? TR:33

After ignoring this request for a telephone call, the police renewed their attack. Mr. Robinson once more attempted to make a phone call, making it clear that he wanted to do so to obtain counsel:

> [ROBINSON]: *I have to get me a good lawyer, man. Can I make a phone call?*
>
> [DETECTIVE FERRAND]: Sure. We'll let you make a phone call . . . local? Hey, you wanta call Mr. Monday [co- defendant Bobby Ray Savage]?
>
> [ROBINSON]: No.

> [DETECTIVE FERRAND]: Do you know where . . . he is located?
>
> [ROBINSON]: I wish I did.
>
> [DETECTIVE FERRAND]: I know where he's located. I know where this guy is located, too.
>
> [DETECTIVE GUARINO]: It's just a matter of time. It's just a matter of going there and gettin' 'em. You have a good opportunity . . .
>
> [ROBINSON]: . . . I guess these two guys have track records, or sumpin', huh?
>
> [DETECTIVE GUARINO]: . . . to give us your (unintelligible). Hey . . . well, we're givin' you the opportunity to give us your side of the story right now, uh . . .

TR: 45-46 (emphasis added). Mr. Robinson ultimately stated that he wanted to call his mother in Pittsburgh; the officers urged Mr. Robinson to tell his mother he'd been "set up."[5] It was after Mr. Robinson made this phone call that the police elicited the incriminating statements which were the subject of his pretrial motion to suppress.[6]

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[5] Mr. Robinson, of course, was still under the impression that it was his obligation to obtain counsel for himself.

[6] The government contends that Mr. Robinson admitted that he and Savage had "hired themselves out" to Gilman. Petition for Writ of Certiorari at 6. However, as the evidence presented at trial demonstrates, Gilman met and hired Savage; Savage, in turn, talked Robinson into driving to Los Angeles with him.

3. The State Court Proceedings

The state appellate court affirmed Robinson's conviction, holding that the trial court's ruling admitting Mr. Robinson's statements was "amply supported by the record." *People v. Gilman and Robinson*, 2d Crim. No. 42532 (Cal. App. 1984) (unpublished opinion) at 27. The court stated that Mr. Robinson was "ruminating to himself, and not asking a question of the officers" when he asked during the initial advisement, "[i]f I say yes, I'd want an attorney, then I'd have to get one here, is that right?" *Id.*

The California Supreme Court denied Robinson's petition for hearing on June 30, 1984. Mr. Robinson subsequently filed two *pro se* habeas petitions with the California Supreme Court; in both, he alleged that he had not made a valid waiver of his *Miranda* rights prior to the interrogation, and that the police had ignored his request for counsel during the interrogation. The first petition was denied on grounds of insufficient particularity on February 26, 1986. The second was denied October 15, 1986; the court cited a rule against repetitive petitions.[7] *See* Report and Recommendation of United States Magistrate, hereafter "Report and Recommendation," at 4.

The district court found that Mr. Robinson had indeed "presented his claims with 'as much particularity as is practicable' . . . . The California Supreme Court's failure to reach the merits of those claims should not prevent review in this court." *Id.* at 5 (citation omitted).

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[7] The rulings are logically inexplicable. If the first petition was insufficient in particularity, it could not be a predicate for dismissal of the second as repetitive.

4. The Federal Court Proceedings

Mr. Robinson subsequently filed the *pro se* federal habeas corpus petition which is the subject of this case.[8] Mr. Robinson again asserted that he had not made a valid waiver of his *Miranda* rights, and that the police had ignored his request for counsel.[9] The order denying his petition was entered on September 13, 1988. Mr. Robinson was not granted an evidentiary hearing. The Magistrate's Report and Recommendation, adopted without modification by the district court, ruled that Mr. Robinson had exhausted his state remedies, and that *Stone v. Powell*, 428 U.S. 465 (1976) did not foreclose review of his *Miranda* claims. The district court held that Mr. Robinson "knowingly and voluntarily" waived his right to have an attorney present during questioning, and that Mr. Robinson

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[8] As the State points out, Robinson simultaneously filed a separate federal habeas petition, alleging that his counsel was deficient in failing to investigate the issue that Mr. Robinson was too intoxicated during the interrogation to make a valid waiver. The State characterizes this petition as "inconsistent;" however, it is perfectly in keeping with his other arguments. Mr. Robinson has always maintained that he did not make a knowing and intelligent waiver of his right to counsel, and that after requesting counsel, he called his mother because he did not understand that he was entitled to have counsel appointed for him. There is nothing inconsistent about the suggestion that his intoxication may have contributed to his misunderstanding.

[9] Despite the State's suggestion to the contrary, Mr. Robinson *did* in fact assert that he was coerced by the police to waive his rights and incriminate himself, and provided a copy of the transcript of his interrogation to the court as proof of that assertion. *See* Traverse at 10.

never made a proper request for the presence of an attorney. Report and Recommendation at 5-7.

Mr. Robinson's appeal from the district court's denial of his petition for a writ of habeas corpus presented two issues for review. First, Mr. Robinson had not knowingly and intelligently waived his right to counsel during custodial interrogation by police. Second, Mr. Robinson requested counsel later in the interrogation and, despite this request, the police continued their interrogation without counsel being present.

The majority of the Ninth Circuit panel that heard this case determined that Mr. Robinson's statement: "I have to get me a good lawyer, man. Can I make a phone call?" amounted to an unequivocal request for counsel. Although it found the initial waiver issue to be one of "serious concern," *Robinson v. Borg*, No. 89-55126 Slip Op. at 15151-52 n.1 (9th Cir. December 11, 1990) (as amended), the majority found it unnecessary to reach the issue because its holding that Mr. Robinson unequivocally requested counsel required suppression of the statements which were introduced against him at trial. The majority did not address the State's contention that *Stone v. Powell* should be extended to foreclose claims such as Robinson's.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Case Does Not Present a "Mere" *Miranda* Violation: Mr. Robinson's Fifth and Fourteenth Amendment Rights Were Violated

a. The officers compelled Mr. Robinson to incriminate himself by refusing to acknowledge his request for counsel

In this case, the officers went far beyond a "technical" violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and affirmatively deprived Mr. Robinson of his Fifth and Fourteenth Amendment rights. The police flatly ignored Mr. Robinson's request for counsel, and continued to interrogate him despite his request. The Ninth Circuit ruled that Mr. Robinson's confession was inadmissible because it was obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *Robinson v. Borg*, Slip op. at 15155-56.

The *Edwards* rule is "designed to protect an accused in police custody from being badgered by police officers." *Smith v. Illinois*, 469 U.S. 91, 95 n.2 (1984) (quoting *Wyrick v. Fields*, 459 U.S. 42, 45-6 (1982) (*per curiam*)). An *Edwards* violation differs significantly from a mere failure to administer some portion of the *Miranda* warnings.[10] Where the claimed violation is a defect in the language used in the *Miranda* advisement, it could be perfectly obvious to all concerned that the suspect was completely

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[10] For an example of a claimed technical violation of *Miranda*, *see Duckworth v. Eagan*, 492 U.S. 195 (1990) (state prisoner alleged that the officers' advisement that he would be entitled to appointed counsel "if and when [he went] to court" did not adequately apprise him of his right to appointed counsel).

willing to submit to questioning, and that the suspect had voluntarily confessed even though *Miranda* was violated. However, when a suspect requests an attorney and the request is ignored, it is difficult to suggest that the resulting statements were voluntarily given. In *Oregon v. Elstad*, 470 U.S. 298 (1985), Justice O'Connor, writing for the Court, found no Fifth Amendment violation in a mere failure to administer *Miranda* warnings. She distinguished the cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." *Id.* at 312-13 n.3 (citations omitted).

The State asserts that Mr. Robinson's *Miranda-Edwards* claim does not establish a constitutional violation. It may be that portions of the *Miranda* rule "sweep more broadly" than the Fifth Amendment. But the very core of *Miranda* is the holding that the Fifth Amendment guarantees the right to counsel during a custodial interrogation. *Miranda v. Arizona*, 389 U.S. at 469. *Edwards* protects that right. When the State disregards an express request for counsel, the State deprives a suspect of his Fifth and Fourteenth Amendment rights:

> In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation – without counsel present – after he requested an attorney.

Shea v. Louisiana, 470 U.S. 51, 52 (1984); *see also Minnick v. Mississippi*, ___ U.S. ___, 111 S.Ct. 486, 489 (1990) ("[W]e

decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel"). In *Shea*, the Court held that *Edwards* described a constitutional rule, which should be applied retroactively to cases pending on direct appeal. *Shea*, 470 U.S. at 52, 59.

This case, like *Minnick v. Mississippi*, demonstrates the importance of providing counsel – when counsel is requested – during questioning. Here, the officers told Mr. Robinson that his post-arrest silence could be used against him at trial.[11] The officers also said that there was a difference between Mr. Robinson's alleged role in the offense and that of Gilman and Savage. In *Minnick*, this Court noted that "[i]f the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. *Minnick, supra*, 111 S. Ct. at 491. Mr. Robinson, similarly confused, would have benefitted from the advice of counsel. *See also Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("Because of [the] special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in

---

[11] The officers told Mr. Robinson that if he remained silent a detective could take the stand during trial and testify that Mr. Robinson had refused to talk to the officers. The interrogating officers also said that the jury could hold Mr. Robinson's silence against him. Of course, the interrogating officers completely misrepresented the law. Under *Doyle v. Ohio*, 426 U.S. 610 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284 (1986), the State cannot comment upon a defendant's assertion of his Fifth Amendment right to remain silent.

the adversary process, . . . 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . . ' " (quoting *Miranda v. Arizona,* 384 U.S. at 469)).

The government asserts that Mr. Robinson has never alleged "governmental coercion that characterizes a true Fifth Amendment self-incrimination violation." Petition for Writ of Certiorari at 17. But a demonstrated violation of *Edwards* gives rise to a presumption that the resulting confession was compelled. Once an accused has requested counsel,

> it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice White has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." (Citation omitted).

Arizona v. Roberson, 486 U.S. 675, 681 (1988); *see also Michigan v. Harvey,* ___ U.S. ___, 110 S.Ct. 1176, 1180 (1990) ("*Edwards* . . . is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations").

A review of the transcript of the interrogation demonstrates that the police actually made an affirmative (and ultimately successful) attempt to dissuade Robinson

from exercising his right to counsel. When Mr. Robinson said "I have to get me a good lawyer, man. Can I make a phone call?" the officers first encouraged him to call co-defendant Savage. Next, they reminded Mr. Robinson that they were "givin' [him] the opportunity to give [them his] side of the story right now . . . ," and balked at allowing Mr. Robinson to use the phone when he stated that he wanted to call his mother in Pennsylvania. Finally, the officers encouraged him to tell his mother that he'd been "used . . . set up, set up by two paddies . . . . " This continued interrogation and coercive behavior deprived Mr. Robinson of his Fifth and Fourteenth Amendment rights.

b. The coercion in the present case goes beyond the officers' refusal to honor Mr. Robinson's request for counsel

The court of appeals' decision focused solely on the *Edwards* violation presented in this case. However, Mr. Robinson asserted other claims demonstrating that police misconduct during the interrogation resulted in violation of Mr. Robinson's Fifth and Fourteenth Amendment rights.

The court of appeals never reached the issue of whether Mr. Robinson made a voluntary, knowing and intelligent waiver of his rights during the initial advisement. In his *pro se* pleadings filed in the district court, Robinson stated:

> The only susceptible reason why three (3) detecteives chose not to answer Petitioner question or clarify Petitioner right to counsel, that they

> intended to *deceive* Petitioner about his right to counsel. . . . The record clearly shows that Petitioner was under the impression that he (Petitioner) would have to get his own attorney. . . . The record also shows that there were coercion by the Detectives throughout the interrogation, were detectives was making sure that Petitioner beleived he was'nt the one they realy wanted.

Traverse at 9-10 (citation omitted; emphasis and spelling as in original). The court of appeals did not reach this issue, but noted that it was a matter of substantial concern. Further, as stated previously, the officers went beyond misleading Mr. Robinson. They lied to him about the prosecutor's ability to make use of his refusal to speak to the officers, they lied to him about whether he was a prime target of the investigation and they lied to him about the legal consequences of his alleged role in the offense.[12]

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[12] The interrogators' conduct was not good police work. As a classic text instructs, an interrogator must not make any comment to the effect that blame cast on an accomplice relieves a suspect of legal responsibility for the suspect's part in an offense. F. Inbau, J. Reid, J. Buckley, *Criminal Interrogation and Confessions* at 114 (3d ed. 1986). Further, an interrogator should not point out the consequences of a confession or hold out any inducement, because any such inducement may improperly coerce a confession. *Id.* at 197. Finally, as already set forth in footnote 11, *supra*, the officers affirmatively misrepresented the legal effect of Mr. Robinson's exercise of his Fifth Amendment right to remain silent.

2. The Reasoning of *Stone v. Powell* Does Not Apply to This Case

The State argues that the reasoning of *Stone v. Powell*, 428 U.S. 465 (1976) should be applied to the present case to prevent Mr. Robinson from asserting his claims on federal habeas corpus. The justifications behind the *Powell* decision, however, do not support a refusal to allow state prisoners to litigate Fifth Amendment violations on federal habeas corpus.

Powell's prohibition is based on the premise that the Exclusionary Rule is not mandated by the Fourth Amendment, but is instead a prophylactic designed to deter police from violating suspects' right to be free from unlawful searches and seizures. 428 U.S. at 486. By the time a state prisoner's claims reach federal habeas corpus, the argument goes, any deterrence value in excluding the evidence is outweighed by the detriment to the criminal justice system caused by the suppression of reliable and probative evidence. *Id.* at 492-94.

There are two problems with this argument as applied to this case. First, "a Fifth Amendment violation may be more likely to affect the truth-finding process than a Fourth Amendment violation." *Shea v. Louisiana*, 470 U.S. 51, 59 (1985). Thus, in framing the Fifth Amendment Exclusionary Rule, courts seek to protect that process as well as to deter police from engaging in unduly coercive conduct. The Fifth Amendment's Exclusionary Rule does not exist merely to deter the police from engaging in improper tactics. Rather,

> [t]he [Fifth] Amendment has its roots in the Framers' belief that a system of justice in which

> the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantee occurs when one is "compelled" by governmental coercion to bear witness against oneself in the criminal process. *The suppression remedy is quite possibly contained within the guarantee of the Fifth Amendment itself.*

Duckworth v. Eagan, 492 U.S. 195, 209 (1990) (O'Connor, J., concurring) (citation omitted; emphasis added).

Second, this case does not involve a "mere" or "technical" *Miranda* violation and the rule of *Stone v. Powell* should not apply.[13] Notwithstanding the State's contention to the contrary, Mr. Robinson has always asserted that police misconduct during the interrogation resulted

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[13] It has been suggested that the *Powell* rule should be extended to state prisoners' claims of "mere" *Miranda* violations: some argue that the *Miranda* warnings, like the Fourth Amendment Exclusionary Rule, are not constitutionally mandated but are a prophylactic measure designed to ensure protection of a suspect's Fifth Amendment rights and to deter police misconduct. Thus, even though the *Miranda* warnings may be defective in a given case, the argument holds that if the suspect's decision to speak to police is otherwise voluntary, the suspect's Fifth Amendment rights have not necessarily been violated. Therefore, *Powell*'s utilitarian analysis arguably would support a claim that the deterrent effect of excluding testimony obtained in technical violation of *Miranda* is outweighed by the other interests at stake. This argument is necessarily limited to non-constitutional claims under *Miranda*. *See Duckworth v. Eagan*, 495 U.S. 195, 212 (1990) (O'Connor, J., concurring).

in his compelled self-incrimination, and the transcript of the interrogation bears this out. The reasoning of *Stone v. Powell* cannot legitimately be extended to claims of full-blown Fifth Amendment violations such as the one at issue here. Indeed, the State concedes as much when it argues that the *Powell* rule should be extended only to claims in which the confession was "otherwise voluntary." Petition for Writ of Certiorari at 13.

3. Congress, Not This Court, Should Decide Whether To Extend *Stone v. Powell* to *Miranda* Violations

This Court should deny the State's petition; this case is not appropriate for review. *Stare decisis* compels this Court to adhere to settled principles of constitutional law. Litigants have long relied upon the federal courts to enforce the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981), and the federal courts must retain the ability to remedy Fifth and Fourteenth Amendment violations in egregious cases. In addition, Congress is currently considering amendments to 28 U.S.C. section 2254 that would accomplish all the State seeks. Any change to the law in this important area should come from the Congress and not from this Court.

This Court has long recognized that *Miranda* and *Edwards* violations are cognizable on federal habeas corpus, and this Court has reached the merits of these

cases on numerous occasions.[14] The Court should be reluctant to abandon this long-held rule. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597, 2609 (1991). Moreover, "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The State cannot meet this heavy burden; there are no changes in the law or in society that would dictate abandoning this Court's long-held rule.

The State suggests that certiorari should be granted in this case because, among other things, "federal *habeas*

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[14] *See Duckworth v. Eagan*, 492 U.S. 195 (1989) (respondent sought habeas corpus relief in federal court claiming that his confession was inadmissible due to *Miranda* violations); *Moran v. Burbine*, 475 U.S. 412 (1986) (petitioner sought federal habeas corpus relief because police did not properly adhere to *Miranda* procedures); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (habeas corpus relief sought contending that roadside questioning of a motorist detained pursuant to a traffic stop is custodial interrogation for *Miranda* purposes); *Estelle v. Smith*, 451 U.S. 454 (1981) (respondent sought federal habeas corpus relief based on the use of statements he made to his psychiatrist without being advised of his Fifth Amendment rights); *Michigan v. Tucker*, 417 U.S. 433 (1974) (respondent sought federal habeas corpus relief contending certain testimony was inadmissible due to a *Miranda* violation).

review of state prisoners' *Miranda* claims occurs regularly." Petition for Writ of Certiorari at 13 n.5. To support this contention, the State cites three cases decided this year by federal appellate courts. What does not occur regularly, however, is federal court *reversal* of state convictions based on *Miranda* claims. In all three cases cited by the State, the courts of appeals affirmed the district courts' denial of petitions for writs of habeas corpus. *See Hill v. Lockhart*, 927 F.2d 340 (8th Cir. 1991); *Lobosco v. Thomas*, 928 F.2d 1054 (11th Cir. 1991); and *Henderson v. Duggs*, 925 F.2d 1309 (11th Cir. 1991).

The distinction is important, because it demonstrates that the system is working as it should be. Federal habeas corpus review under 28 U.S.C. section 2254 ensures that the states enforce individual constitutional rights. If the states are faithful to the Constitution in the vast majority of cases, it is safe to assume that the federal courts will not overturn state convictions absent truly deplorable conduct. But when an egregious case – such as this one – arises, federal habeas corpus must be available to protect individual constitutional rights.

Finally, the Congress is currently considering whether to amend 28 U.S.C. section 2254. One proposed bill, S. 635, 102d Cong., 1st Sess. (1991), has already passed the Senate. S. 635 would amend section 2254 to require the federal courts to deny state prisoners' applications for writs of federal habeas corpus "with respect to any claim that has been fully and fairly adjudicated in State proceedings." S. 635, 102d Cong., 1st Sess. § 205, 137 Cong. Rec. S3193, S3199 (daily ed. Mar. 13, 1991). The amendments contained in S. 635 would thus sweep even more broadly than the rule the State asks this Court to

adopt in this case. The bill was introduced in the House of Representatives as H.R. 1400, 102d Cong., 1st Sess. (1991). *See* 137 Cong. Rec. H1669 (daily ed. Mar. 12, 1991).

In *Vasquez v. Hillery*, 474 U.S. 254 (1986), this Court declined to adopt a rule that would prohibit federal courts from granting habeas corpus relief because of potential prejudice to the prosecution. This Court noted that Congress, despite many attempts, had not created a statute of limitations in habeas corpus cases. As the *Hillery* Court held, "[w]e should not lightly create a new judicial rule, in the guise of constitutional interpretation, to achieve the same end." *Id.* at 265.[15] Since the Congress is currently considering amending section 2254, which would restrict the federal courts' habeas corpus jurisdiction, this Court should refrain from acting. The State's petition for writ of certiorari should be denied lest this Court interfere with the Congress' power to delineate the appropriate jurisdiction of the federal courts.

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[15] Arguments against *stare decisis* are perhaps strongest where "correction through legislative action is practically impossible." *Payne v. Tennessee*, 111 S.Ct. at 2610, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932). Here, of course, the Senate has already passed a bill amending section 2254, and the same legislation is pending in the House of Representatives. It cannot be said that the legislature is incapable of making any "corrections," if corrections are indeed necessary.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-258

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R. G. Borg, Warden, ***Petitioner,***

v.

Ricardo H. Robinson, ***Respondent.***

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF IDAHO, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND WASHINGTON, AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rationale of *Stone* v. *Powell,* 428 U.S. 465 (1976), ordinarily precluding federal *habeas corpus* review of Fourth Amendment Exclusionary Rule claims raised by state prisoners, also forecloses federal *habeas corpus* inquiry into a state prisoner's evidentiary claim under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and its progeny, when the *Miranda*-based claim is unaccompanied by any assertion or proof that the challenged evidence of the prisoner's statements had been obtained from him through coercion and the prisoner had enjoyed a full and fair opportunity to litigate the claim in state court.

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No. 91-258

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

R. G. Borg, Warden, ***Petitioner,***

v.

Ricardo H. Robinson, ***Respondent.***

INTERESTS OF AMICI CURIAE

Amici Curiae are states concerned with the finality and enforceability of their courts' criminal judgments. Amici support the position of R. G. Borg for a writ of certiorari in the belief that extending the rule of *Stone v. Powell,* 428 U.S. 465 (1976), to Fifth Amendment claims as suggested by the state of California would substantially improve the administration of state criminal justice systems.

ARGUMENT

The Court's decision in *Stone v. Powell,* 428 U.S. 465 (1976), was premised in part on the principle that the exclusion of unlawfully seized evidence is neither a personal right nor a necessary incident of accurate factfinding.

> The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights. . . . It is not calculated to redress the injury to the privacy of the victim of the search and seizure. . . . [D]espite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. [Citation omitted.]" *Stone v. Powell,* 428 U.S. at 486-487.

Stone v. Powell takes account of both the limited usefulness of federal constitutional collateral review of state court decisions settling Fourth Amendment claims and "the acknowledged costs [of the exclusionary rule] to other values vital to a rational system of criminal justice." 428 U.S. at 494. By its decision, the Court took the sensible step of mitigating an unnecessary intrusion into the finality of state court judgments. There is no reason to think -- certainly none has been suggested by the Ninth Circuit Court of Appeals -- that the decision in *Stone v. Powell* has diminished the efficacy of the Fourth Amendment.

It is well past time to fully explore the implications of a ruling that 'the rationale of *Stone* should be applied to those Fifth and Sixth Amendment claims or classes of claims that . . . closely parallel claims under the Fourth Amendment . . . ." *Brewer v. Williams,* 430 U.S. 387, 413-414 (1976) (Powell, J., concurring).

The evidentiary exclusion of *Miranda v. Arizona,* 384 U.S. 436 (1966), bars more than involuntary statements. It operates to prevent the use of any statement taken during custodial interrogation if *Miranda* warnings have not been given or have been defectively given, even in minor particulars. As is the case with the Fourth Amendment rule of exclusion, the *Miranda* rule, at least when it is applied to voluntary statements, has no purpose to protect the defendant individually, to insure his right to a fair trial, or to preserve the accuracy of the fact-finding function of the trial. Like the Fourth Amendment exclusionary rule, the collateral consequences of *Miranda* exclusions often include the promotion of unfair trials and inaccurate results because the operation of the rule can mean the exclusion of highly reliable evidence and the acquittal of plainly guilty offenders. See *Stone v. Powell, supra.*

The purposes of *Miranda v. Arizona* are completely served when state procedure affords the defendant a full opportunity to litigate his Fifth and Sixth Amendment claims in state court. State courts routinely give solemn consideration not only to valid *Miranda*-based claims for relief, but to every imaginable extension of *Miranda* as well. For example, state courts have considered assertions that an arrestee was entitled to *Miranda* warnings before giving booking information to an arresting officer, *State v. Jeney,* 163 Ariz. 293, 787 P.2d 1089 (Ariz. App. 1989), that *Miranda* warnings must be tape recorded and contemporaneously memorialized in writing as an aspect of "fundamental fairness," *People v. Marshall,* 50 Cal.3d 907, 790 P.2d 676 (Cal. 1990), and that *Miranda* required suppression of a spontaneous confession to murder given by a person who reported hearing voices telling him to do so, *Colorado v. Connelly,*

479 U.S. 157 (1986). The willingness of state courts to consider *Miranda* claims and to expansively construe the *Miranda* rule seems to have been anything but grudging. Cf. *People v. Horn,* 790 P.2d 816 (Colo. 1990)(holding that whether one is in custody for *Miranda* purposes must be determined by litigating the factual question whether a defendant has been deprived of his liberty in a significant way); *State v. Valdez,* 117 Idaho 302, 787 P.2d 288 (Idaho App. 1989)(holding that admissions made after *Miranda* warnings and waiver of rights would nevertheless be excluded because the defendant earlier had accepted a court's offer to appoint counsel); *Light v. State,* 547 N.E..2d 1073 (Indiana 1989)(reviewing numerous factors to be considered in determining the voluntariness of statements given during custodial interrogation); *State v. McQuay,* 154 Wis.2d 116, 452 N.W.2d 377 (Wisc. 1990)(considering whether a presentence interview was accusatorial in nature and thus subject to *Miranda*). It cannot reasonably be argued that state processes are inadequate to protect the rights against compulsory self-incrimination and to the assistance of counsel.

The Ninth Circuit Court of Appeals went beyond anything necessary to insure that federal rights are respected in state courts when it held that Robinson was entitled by *Miranda* to be protected from the consequences of his calculating, con-wise effort to persuade the police he had nothing to do with the murder of Patricia Worrell. This case turned in the Court of Appeals on subjective values advocated by a majority of the panel which sat in judgment on the work of the California courts. Two members of the panel which decided this case found that Robinson's statement, "I have to get me a good lawyer, man. Can I make a

phone call?," followed by a phone call to his mother before Robinson continued with his original intent to answer questions outside the presence of counsel, somehow amounted to an unequivocal demand for counsel. A dissenting judge considered the circumstances indicative of an *equivocal* request for counsel because ambiguity was created by Robinson's reference to getting a lawyer "made in the midst of a continuing conversation *preceded by* a waiver and an express willingness to talk." *Robinson v. Borg,* slip op., p. 15167. There is no objective reason to consider any of these views a necessary improvement upon the resolution of Robinson's *Miranda* claims by the California courts. In fact, there is a striking contrast between the way Robinson's case was decided in the court of appeals and this Court's focus in cases involving uncertainties about the environment in which an interrogation has taken place. In *Arizona v. Mauro,* 481 U.S. 520 (1987), the police, after trying to discourage a suspect's wife from visiting him, agreed only on the condition that a police officer be present with a tape recorder. The tape recording was later used in evidence against the defendant. Relying on *Rhode Island v. Innis,* 446 U.S. 291 (1980), and the theory that the police conduct was reasonably likely to invoke an incriminating response, the Arizona Supreme Court concluded that the recording was not properly admitted at trial. This Court reversed, holding that it doubted "that a suspect, told by officers that his wife would be allowed to speak to him, would feel he was being coerced to incriminate himself in any way." 481 U.S. at 528.

The underlying question was seen as one concerned with the coercive effect of the disputed police conduct:

> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards:* Preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. 481 U.S. at 529-530.

Cf. *Papile v. Hernandez,* 697 F.Supp. 626 (E.D. N.Y. 1988)(police response to petitioner's offer of a deal by asking the question "what kind of deal?" did "not carry even the slightest suggestion of the coercion, manipulation or trickery which concerned the Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 . . . .").

While this Court was concerned in *Mauro* with whether it could plausibly be found that the defendant was coerced to incriminate himself, the majority below applied a technical and unrealistic interpretation of federal law to undo the conviction of a dangerous killer.

This case is not untypical. *Miranda* is often applied in federal courts in a manner which makes of the rule little more than a device by which federal judges may substitute their own subjective views for the equally reasonable views of state judges. See, e.g., *Towne v. Dugger,* 899 F.2d 1104 (11th Cir. 1990).

No deterrent to the intentional violation of the right against self-incrimination can forseeably arise from a system of federal collateral review which allows for the suppression of a clearly voluntary statement accompanied by a *Miranda* waiver merely because the defendant has paused during the conversation to consider out loud whether to get a lawyer. In the concurring opinion in *Duckworth v. Eagan,* 492 U.S. 195 (1989), it was observed that the decision in *Stone v. Powell* was

motivated by the Court's recognition that federal habeas review of Fourth Amendment claims already litigated in state courts was of doubtful value.

> In *Stone,* we found that application of the exclusionary rule to Fourth Amendment violations on federal habeas was likely to have only marginal effectiveness in deterring police misconduct, while offending important principles of federalism and finality in the criminal law which have long informed the federal courts's exercise of habeas jurisdiction. In my view this same weighing process leads ineluctably to the conclusion that the suppression remedy should not be available on federal habeas where the state courts have accorded a petitioner a full and fair opportunity to litigate a claim that *Miranda* warnings were not given or were somehow deficient. Indeed, the scales appear to me to tip further toward finality and repose in this context than in *Stone* itself. *Duckworth v. Eagan,* 492 U.S. at 208-209 (O'Connor, J., and Scalia, J., concurring).

The analysis in the concurring opinion in *Eagan* also reflects another reason for barring claims like the one raised by Robinson in this case. Besides the question of efficacy and *habeas* policy, collateral review of state prisoners' *Miranda* claims raises a basic jurisdictional question under 28 U.S.C. § 2254. That statute grants federal courts jurisdiction to entertain *habeas corpus* petitions brought by prisoners "in custody in violation of the Constitution, laws or treaties of the United States." To the extent that the *Miranda* rule "sweeps more

broadly than the Fifth Amendment itself" and "may be triggered in the absence of a Fifth Amendment violation," see *Oregon* v. *Elstad,* 470 U.S. 298, 306-310 (1985), it does not confer a constitutional right. See *Duckworth* v. *Eagan*, *supra*, 492 U.S. at 209-210 (concurring op.). Non-constitutional, non-coercive violations of *Miranda*, then, are not cognizable under § 2254 in the first place.

This is a highly appropriate time for the Court to look closely at the enforcement of *Miranda v. Arizona* by the state courts and to conclude that the rationale of *Stone v. Powell* applies with even greater force in this context. Federal habeas review is an increasingly intrusive obstacle to the enforcement of fair and reliable state court judgments. It is true, as Justice Kennedy points out in *McCleskey v. Zant,* _____ U.S. _____, 113 L.Ed.2d 517, 543 (1991), that "perpetual disrespect for the finality of convictions disparages the entire criminal justice system." For this reason, the Court should not further delay the extension of *Stone v. Powell* to claimed violations of the Fifth and Sixth Amendments.

CONCLUSION

The Court should grant the petition of R. G. Borg, Warden, for a writ of certiorari and should grant the relief for which petitioner prays.

Respectfully submitted,

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